

EXHIBIT 2

Transcript of Edward A. Lemmo, Ph.D.

1 (1 to 4)

October 24, 2022

<p>1 UNITED STATES DISTRICT COURT</p> <p>2 EASTERN DISTRICT OF MICHIGAN</p> <p>3 SOUTHERN DIVISION</p> <p>4 -----X</p> <p>5 TRUTEK CORP., :</p> <p>6 Plaintiff/Counter-Defendant,: Case No.:</p> <p>7 v. : 2:21-cv-10312</p> <p>8 BLUEWILLOW BIOLOGICS, INC. :</p> <p>9 Defendant/Counter-Plaintiff,:</p> <p>10 ROBIN ROE 1 through 10 :</p> <p>11 (fictitious names); ABC :</p> <p>12 CORPORATION 1 through 10 :</p> <p>13 (fictitious names), :</p> <p>14 Defendants. :</p> <p>15 -----X</p> <p>16</p> <p>17 Deposition of EDWARD A. LEMMO, PH.D.</p> <p>18 Conducted Remotely</p> <p>19 Monday, October 24, 2022</p> <p>20 10:00 a.m.</p> <p>21</p> <p>22</p> <p>23 Job No.: 468438</p> <p>24 Pages: 1-283</p> <p>25 Reported by: Matthew Goldstein, RMR, CRR</p>	<p>1 A P P E A R A N C E S</p> <p>2 ON BEHALF OF THE PLAINTIFF, TRUTEK CORP.:</p> <p>3 STANLEY H. KREMEN, ESQUIRE</p> <p>4 4 Lenape Lane</p> <p>5 East Brunswick, New Jersey 08816</p> <p>6 732.593.7294</p> <p>7</p> <p>8 ON BEHALF OF THE DEFENDANT, BLUEWILLOW</p> <p>9 BIOLOGICS, INC.:</p> <p>10 LIANE M. PETERSON, ESQUIRE</p> <p>11 FOLEY & LARDNER</p> <p>12 3000 K Street, NW</p> <p>13 Suite 600</p> <p>14 Washington, D.C. 20007</p> <p>15 202.672.5300</p> <p>16</p> <p>17 ALSO PRESENT:</p> <p>18 JENNIFER PODIS - REMOTE TECHNICIAN</p> <p>19 JOHN PARKMAN - VIDEOGRAPHER</p> <p>20 ASHOK WAHI</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>1 Deposition of EDWARD LEMMO, PH.D., conducted</p> <p>2 remotely:</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9 Pursuant to Notice, before Matthew Goldstein,</p> <p>10 RMR, CRR, Notary Public in and for the State of</p> <p>11 Maryland.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF EDWARD ANTHONY LEMMO PAGE</p> <p>3</p> <p>4 By MS. PETERSON 8</p> <p>5 E X H I B I T S</p> <p>6 (Attached)</p> <p>7 LEMMO DEPOSITION EXHIBIT PAGE</p> <p>8</p> <p>9 Exhibit 2 Previously Marked, United States Patent No. 8,163,802 41</p> <p>10 Exhibit 12 Deposition Notice of Edward A. Lemmo 12</p> <p>11 Exhibit 13 Plaintiff's Opening Technical Report 54</p> <p>12</p> <p>13 Exhibit 14 Plaintiff's Expert Report of Edward A. Lemmo, Ph.D. 54</p> <p>14 Responsive to and in Rebuttal of Defendant's Opening Expert Report of Mansoor M. Amiji</p> <p>15</p> <p>16 Exhibit 15 Report of Edward A. Lemmo, Ph.D. in Reply to Defendant's Expert Report on Non-infringement 55</p> <p>17</p> <p>18</p> <p>19 Exhibit 16 Curriculum Vitae of Edward A. Lemmo, Ph.D. 66</p> <p>20 Exhibit 17 Declaration of Edward A. Lemmo, Ph.D. in Support of Trutek Corp.'s Claim Construction Brief 136</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

Transcript of Edward A. Lemmo, Ph.D.

2 (5 to 8)

October 24, 2022

<p>5</p> <p>1 (Continued)</p> <p>2 E X H I B I T S</p> <p>3 Exhibit 18 Materials Reviewed for Report 216 Preparation</p> <p>4 Exhibit 19 Skin Models for the Testing of 274 Transdermal Drugs</p> <p>5 Exhibit 20 Formation and Stability of 275 oil-in-water Nanoemulsions Containing Rice Bran Oil: In Vitro and In Vivo Assessments</p> <p>6 Exhibit 21 United States Patent 275 Application Publication 2004/0071757</p> <p>7 Exhibit 22 Declaration of Dr. Edward Lemmo 276 in Trutek v. Matrixx</p>	<p>7</p> <p>1 No. 2:21-cv-10312.</p> <p>2 Today's date is Monday, October 24th,</p> <p>3 2022. The time on the video monitor is now</p> <p>4 10 a.m. Eastern Time.</p> <p>5 The remote videographer today is John</p> <p>6 Parkman representing Planet Depos.</p> <p>7 All parties to this video deposition are</p> <p>8 attending remotely.</p> <p>9 Would counsel please voice identify</p> <p>10 themselves and state whom they represent.</p> <p>11 MR. KREMEN: Stanley Kremen for the</p> <p>12 plaintiff.</p> <p>13 MS. PETERSON: And Liane Peterson from</p> <p>14 Foley & Lardner LLP, on behalf of the plaintiff,</p> <p>15 BlueWillow Biologics -- or sorry, on behalf of the</p> <p>16 defendant, BlueWillow Biologics.</p> <p>17 THE VIDEOGRAPHER: The court reporter</p> <p>18 today is Matthew Goldstein also representing</p> <p>19 Planet Depos.</p> <p>20 Would the reporter please swear in the</p> <p>21 witness.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>6</p> <p>1 THE REMOTE TECHNICIAN: Thank you to</p> <p>2 everyone for attending this proceeding remotely,</p> <p>3 which we anticipate will run smoothly.</p> <p>4 Please remember to speak slowly. Do</p> <p>5 your best not to talk over one another. Please be</p> <p>6 aware that we are recording this proceeding for</p> <p>7 backup purposes.</p> <p>8 Any off-the-record discussions should be</p> <p>9 had away from the computer. Please remember to</p> <p>10 mute your mic for those conversations.</p> <p>11 Please have your video enabled to help</p> <p>12 the reporter identify who is speaking. If you're</p> <p>13 unable to connect with video and connecting via</p> <p>14 phone, please identify yourself each time before</p> <p>15 speaking.</p> <p>16 I apologize in advance for any</p> <p>17 technical-related interruptions. Thank you.</p> <p>18 THE VIDEOGRAPHER: All right. Just a</p> <p>19 moment, please, and I'll get us on the record.</p> <p>20 Here begins media No. 1 in the</p> <p>21 videotaped deposition of Dr. Edward A. Lemmo in</p> <p>22 the matter of Trutek Corporation versus BlueWillow</p> <p>23 Biologics Incorporated, et al., in the United</p> <p>24 States District Court Eastern District of</p> <p>25 Michigan, Southern Division, Case</p>	<p>8</p> <p>1 P R O C E E D I N G S</p> <p>2 Whereupon,</p> <p>3 EDWARD LEMMO, PH.D.,</p> <p>4 being first duly sworn or affirmed to testify to</p> <p>5 the truth, the whole truth, and nothing but the</p> <p>6 truth, was examined and testified as follows:</p> <p>7 EXAMINATION BY COUNSEL FOR THE DEFENDANT</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. Good morning. Can you please state your</p> <p>10 full name and address for the record?</p> <p>11 A. Yes. My name is Edward, middle name is</p> <p>12 Anthony, last name is Lemmo. And my home address</p> <p>13 is 60 Gilroy Street, Staten Island, New York</p> <p>14 10309.</p> <p>15 Q. And just to introduce myself, my name is</p> <p>16 Liane Peterson. I'm with the law firm of Foley &</p> <p>17 Lardner. And I am counsel representing the</p> <p>18 defendant, BlueWillow Biologics, in this case. So</p> <p>19 I'll be asking the questions today.</p> <p>20 Can I ask you, Dr. Lemmo, where are you</p> <p>21 located today?</p> <p>22 A. I'm located in my home.</p> <p>23 Q. Is there anybody else in the room with</p> <p>24 you?</p> <p>25 A. No.</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

October 24, 2022

<p>9</p> <p>1 Q. And, Dr. Lemmo, have you had your</p> <p>2 deposition taken before?</p> <p>3 A. I've never given a deposition.</p> <p>4 Q. And I assume that would be no deposition</p> <p>5 in an expert capacity; correct?</p> <p>6 A. That's correct.</p> <p>7 Q. And you've never had your deposition</p> <p>8 taken in any other capacity, like in your personal</p> <p>9 capacity?</p> <p>10 A. No, unless you consider something like</p> <p>11 traffic court.</p> <p>12 Q. Okay. Well, let me just run through a</p> <p>13 few ground rules just to kind of familiarize you</p> <p>14 with the process.</p> <p>15 So I'll be asking you a series of</p> <p>16 questions throughout the day. I would ask that</p> <p>17 you wait until I finish with my question before</p> <p>18 responding. And, of course, I'll try to do the</p> <p>19 same when you're speaking. I'll try to wait to</p> <p>20 ask my next question until when you're done.</p> <p>21 Is that okay?</p> <p>22 A. That's fine. Thank you.</p> <p>23 Q. And, of course, it's really important</p> <p>24 that we try not to speak over each other because</p> <p>25 that will help Matthew, our court reporter, take</p>	<p>11</p> <p>1 copy of the exhibit in the chat -- in the chat</p> <p>2 room. And so you can directly open up the</p> <p>3 document from there. Once we use a document, you</p> <p>4 can open it from the chat, and then that way you</p> <p>5 can look at it separately on your own, as well.</p> <p>6 Okay?</p> <p>7 A. Okay. Okay.</p> <p>8 Q. And that will be available to everybody.</p> <p>9 MR. KREMEN: Can I ask a question,</p> <p>10 Liane? We last time -- at the last deposition we</p> <p>11 agreed that we would have universal numbering of</p> <p>12 exhibits. So that -- Exhibits 1 through 11 have</p> <p>13 already been numbered.</p> <p>14 Is that okay with you?</p> <p>15 MS. PETERSON: Yeah, so we'll start with</p> <p>16 any new exhibits today with 12. Yep, that's the</p> <p>17 plan.</p> <p>18 MR. KREMEN: Sorry for interrupting.</p> <p>19 MS. PETERSON: Okay. Let's go ahead and</p> <p>20 pull up the first exhibit. And this is going to</p> <p>21 be the deposition notice of Dr. Lemmo. And we'll</p> <p>22 mark that as Exhibit 12.</p> <p>23 (Lemmo Deposition Exhibit 12 was marked</p> <p>24 for identification and attached to the</p> <p>25 transcript.)</p>
<p>10</p> <p>1 down a clean and accurate record of the deposition</p> <p>2 today. Okay?</p> <p>3 A. Thank you. Yes.</p> <p>4 Q. I would also ask that you provide verbal</p> <p>5 responses and answers to my questions rather than</p> <p>6 shaking your head or nodding or saying "uh-huh."</p> <p>7 Is that fine?</p> <p>8 A. That's fine.</p> <p>9 Q. Okay. And let me know at any point if</p> <p>10 you don't understand my question. I can rephrase</p> <p>11 it if you need me to. Otherwise, if you don't ask</p> <p>12 me for clarification, I'll assume that you</p> <p>13 understand the question. Okay?</p> <p>14 A. Yes. Thank you.</p> <p>15 Q. And, Dr. Lemmo, are you aware of any</p> <p>16 reason why you would be unable to provide complete</p> <p>17 and truthful testimony during this deposition</p> <p>18 today?</p> <p>19 A. No.</p> <p>20 Q. Okay. Now, one other kind of</p> <p>21 housekeeping note, so Jennifer, our technician,</p> <p>22 will be displaying the exhibits up on the screen,</p> <p>23 and she can move through those if we need to look</p> <p>24 at any particular sections. And at the same time,</p> <p>25 when the exhibit is marked, she's going to put a</p>	<p>12</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Dr. Lemmo, have you seen Exhibit 12</p> <p>3 before?</p> <p>4 A. No, I have not.</p> <p>5 Q. But you understand that you are</p> <p>6 appearing today pursuant to this deposition notice</p> <p>7 that's been marked as Exhibit 12?</p> <p>8 A. Yes.</p> <p>9 MS. PETERSON: We can take that down.</p> <p>10 BY MS. PETERSON:</p> <p>11 Q. Dr. Lemmo, have you been retained as an</p> <p>12 expert, either in a testifying or consulting</p> <p>13 capacity, for any matter other than this matter in</p> <p>14 the past four years?</p> <p>15 MR. KREMEN: Objection to the form of</p> <p>16 the question.</p> <p>17 THE WITNESS: Yes.</p> <p>18 BY MS. PETERSON:</p> <p>19 Q. And how many matters?</p> <p>20 A. In a -- as a consultant -- can you just</p> <p>21 repeat the question?</p> <p>22 Q. Have you been retained as an expert --</p> <p>23 I'll break it down.</p> <p>24 Have you been retained as a testifying</p> <p>25 expert in any other matters in the past</p>

October 24, 2022

<p>13</p> <p>1 four years, apart from this matter involving 2 Trutek?</p> <p>3 A. No.</p> <p>4 Q. Have you been retained as a consulting 5 expert to provide consulting expert analysis in 6 connection with any litigation matter in the past 7 four years?</p> <p>8 A. Yes.</p> <p>9 Q. How many times?</p> <p>10 A. One time.</p> <p>11 Q. And who were the parties involved?</p> <p>12 A. Trutek and Matrixx Initiatives.</p> <p>13 Q. And in connection with that prior matter 14 for Trutek involving Matrixx, did you prepare any 15 expert reports?</p> <p>16 A. Yes.</p> <p>17 Q. How many?</p> <p>18 A. I believe it was three. I may be wrong.</p> <p>19 Q. And do you recall the general subject 20 matter of those three reports?</p> <p>21 A. Not offhand. I spoke about the 22 infringement of the patent, the patent by Trutek, 23 by Matrixx representing the Zicam product line.</p> <p>24 Q. And did all three reports that you 25 prepared in connection with the Trutek Matrixx</p>	<p>15</p> <p>1 Q. And do you know what patent was the 2 subject of those IPR proceedings?</p> <p>3 A. I'm sorry, can you explain that?</p> <p>4 Q. Well, you understand that an IPR 5 proceeding challenges the validity of a patent at 6 the United States Patent and Trademark Office; 7 correct?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what patents were being 10 challenged in those IPR proceedings for which you 11 prepared declarations?</p> <p>12 A. I believe it was the Trutek '802 patent.</p> <p>13 Q. And have you ever been retained by any 14 other entity or any other party to provide any 15 declaration or expert testimony in any other IPR 16 proceeding?</p> <p>17 A. No.</p> <p>18 Q. What about a PGR proceeding?</p> <p>19 A. I don't know what a PGR proceeding is.</p> <p>20 Q. Okay. What about a reexamination, are 21 you familiar with that?</p> <p>22 A. No.</p> <p>23 Q. So you haven't prepared any declarations 24 or provided any testimony in connection with a 25 reexamination either?</p>
<p>14</p> <p>1 matter involving infringement of the Zicam 2 product?</p> <p>3 A. It was the Zicam product infringing on 4 the technology of Trutek.</p> <p>5 Q. Okay. But did all three of the reports 6 that you prepared, did they all relate to those 7 issues of infringement, or did they cover other 8 issues, as well?</p> <p>9 A. I don't remember.</p> <p>10 Q. And did you -- have you ever prepared a 11 declaration or some other type of sworn statement 12 for any prior litigation proceeding involving 13 Trutek?</p> <p>14 A. No.</p> <p>15 Q. And what about apart from litigation, 16 have you prepared or signed any declarations or 17 expert reports in connection with any other 18 contested proceedings such as an IPR involving 19 Trutek?</p> <p>20 A. Yes.</p> <p>21 Q. How many times?</p> <p>22 A. I believe once or twice.</p> <p>23 Q. And were those IPR proceedings or 24 something else?</p> <p>25 A. IPR proceedings.</p>	<p>16</p> <p>1 A. No.</p> <p>2 MR. KREMEN: Objection to the form of 3 the question.</p> <p>4 BY MS. PETERSON:</p> <p>5 Q. And to the best of your knowledge, are 6 you -- actually, let me back up.</p> <p>7 Going back to those IPR proceedings for 8 which you were retained by Trutek, how many 9 declarations did you prepare?</p> <p>10 A. Again, I believe it was either one or 11 two.</p> <p>12 Q. Okay. To the best of your knowledge, 13 are you aware if your proposed testimony or 14 opinions has ever been challenged or excluded by a 15 court or the patent office?</p> <p>16 MR. KREMEN: Objection to the form of 17 the question.</p> <p>18 THE WITNESS: Can you rephrase that for 19 me?</p> <p>20 BY MS. PETERSON:</p> <p>21 Q. Just if you even know, to the best of 22 your knowledge, has your proposed opinions 23 contained in any of your prior reports or 24 declarations, has it ever been challenged in terms 25 of whether it's admissible?</p>

Transcript of Edward A. Lemmo, Ph.D.

5 (17 to 20)

October 24, 2022

<p>17</p> <p>1 A. Not to my knowledge.</p> <p>2 Q. And have you -- apart from the work that</p> <p>3 you've done in connection with the prior Trutek</p> <p>4 matter involving Matrixx and the current Trutek</p> <p>5 matter involving BlueWillow, have you ever</p> <p>6 provided any consulting services in connection</p> <p>7 with any nasal antiseptic products?</p> <p>8 A. No.</p> <p>9 Q. And so I would also assume that you</p> <p>10 haven't prepared any reports or any declarations</p> <p>11 in connection with any analysis of any nasal</p> <p>12 antiseptic products for purposes of acting as a</p> <p>13 testifying expert either?</p> <p>14 A. Correct.</p> <p>15 Q. And have you ever provided any</p> <p>16 consulting services for any other company apart</p> <p>17 from these two matters with respect to</p> <p>18 compositions intended to be applied to the nasal</p> <p>19 passages for reducing the risk of infection by</p> <p>20 either bacteria or viruses?</p> <p>21 A. No.</p> <p>22 MR. KREMEN: Objection to the form of</p> <p>23 the question.</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. And I assume you haven't been retained</p>	<p>19</p> <p>1 by Trutek for the Matrixx matter?</p> <p>2 A. I believe that was in 2019.</p> <p>3 Q. And so prior to your retention in 2019,</p> <p>4 as I understand it, you had no prior contact or</p> <p>5 any involvement with Trutek; is that correct?</p> <p>6 A. That's correct.</p> <p>7 Q. Or any employees of Trutek?</p> <p>8 A. That's correct.</p> <p>9 Q. Or any of the lawyers representing</p> <p>10 Trutek?</p> <p>11 A. That's correct.</p> <p>12 Q. And who were you retained by for this</p> <p>13 matter?</p> <p>14 A. Mr. Kremen.</p> <p>15 Q. Okay. Do you intend to testify at the</p> <p>16 trial in this case?</p> <p>17 A. If necessary --</p> <p>18 Q. And what about --</p> <p>19 A. -- yes.</p> <p>20 Q. What about the Markman hearing, do you</p> <p>21 intend to testify there?</p> <p>22 A. If necessary, yes.</p> <p>23 Q. Have you been asked to?</p> <p>24 A. No.</p> <p>25 Q. And will you be compensated for</p>
<p>18</p> <p>1 as an expert to testify on any such matters</p> <p>2 either; is that correct?</p> <p>3 A. That's correct.</p> <p>4 Q. Have you ever been retained by Trutek to</p> <p>5 provide any expert or consulting services on any</p> <p>6 other matters beyond this BlueWillow and the prior</p> <p>7 Matrixx matter?</p> <p>8 A. No.</p> <p>9 Q. Have you ever been retained by Trutek's</p> <p>10 counsel, Mr. Stanley Kremen, previously on any</p> <p>11 other matter?</p> <p>12 A. No.</p> <p>13 Q. And have you ever been retained by</p> <p>14 Trutek's other attorney, Keith Altman of the</p> <p>15 Altman law firm, on any other matter?</p> <p>16 A. No.</p> <p>17 Q. And what about Amirali Haidri -- I don't</p> <p>18 know if I said that name correct -- have you ever</p> <p>19 been retained by him or his firm to provide any</p> <p>20 expert or consulting services?</p> <p>21 A. No.</p> <p>22 Q. Dr. Lemmo, when were you retained by</p> <p>23 Trutek for this matter?</p> <p>24 A. I believe it was sometime in 2021.</p> <p>25 Q. And do you recall when you were retained</p>	<p>20</p> <p>1 testifying at trial?</p> <p>2 A. I believe so, yes.</p> <p>3 Q. And what is your hourly rate that you're</p> <p>4 charging Trutek for this matter?</p> <p>5 A. \$250 per hour.</p> <p>6 Q. And is that the same rate that you</p> <p>7 charge for providing testimony, whether by</p> <p>8 deposition or at trial?</p> <p>9 A. Yes.</p> <p>10 Q. Approximately how many hours have you</p> <p>11 accrued to date working on this matter?</p> <p>12 A. From the beginning you're referring to,</p> <p>13 from when I was first retained in 2021?</p> <p>14 Q. Yes.</p> <p>15 A. It's hard for me to say. I could give</p> <p>16 you an estimate, if that's okay.</p> <p>17 Q. Yeah, give me an estimate.</p> <p>18 A. I would say perhaps 60 hours.</p> <p>19 Q. And that's your best estimate sitting</p> <p>20 here today?</p> <p>21 A. That's my best estimate. It's difficult</p> <p>22 without information in front of me for how many</p> <p>23 times I either had to do reviews of material or</p> <p>24 had conversation with the attorney or any matter</p> <p>25 related to this.</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

October 24, 2022

<p>21</p> <p>1 Q. Do you keep records of how much time you</p> <p>2 spend working on this matter?</p> <p>3 A. Yes.</p> <p>4 Q. And do you send invoices to Mr. Kremen?</p> <p>5 A. I send invoices directly to Trutek.</p> <p>6 Q. Okay. And whose attention are those</p> <p>7 sent to?</p> <p>8 A. They're sent to Ashok Wahi, and I copy</p> <p>9 Mr. Kremen.</p> <p>10 Q. Okay.</p> <p>11 Okay. So just generally speaking, I</p> <p>12 don't want to know necessarily the subject of any</p> <p>13 conversations, but I would like to know the names</p> <p>14 of the people that you have spoken with in</p> <p>15 connection with your work on this matter involving</p> <p>16 BlueWillow.</p> <p>17 A. Conversations include Stan Kremen, Ashok</p> <p>18 Wahi, Alexi Ermakov, and Shane Burns.</p> <p>19 Q. Okay. Now, let's start with Alex</p> <p>20 Ermakov. How many times have you spoken with him?</p> <p>21 A. One time.</p> <p>22 Q. When was that?</p> <p>23 A. It was in October. I believe it was</p> <p>24 October 14th.</p> <p>25 Q. Of what year?</p>	<p>23</p> <p>1 A. Yes.</p> <p>2 Q. Did you watch the actual study that</p> <p>3 Dr. Ermakov conducted?</p> <p>4 A. No.</p> <p>5 Q. Did he replicate that study for you when</p> <p>6 you visited him on October 14th, 2022?</p> <p>7 A. He did not replicate it.</p> <p>8 Q. And then just to confirm, I would expect</p> <p>9 that since the only time you spoke to Dr. Ermakov</p> <p>10 or met with him in person was about ten days ago,</p> <p>11 would it be fair to say that you did not speak</p> <p>12 with him prior to submitting your opening report</p> <p>13 or your reply report in this matter?</p> <p>14 A. Yes.</p> <p>15 Q. And you did not view the equipment that</p> <p>16 he used in this study prior to preparing any of</p> <p>17 your expert reports either; correct?</p> <p>18 A. Only on the report diagram where the</p> <p>19 equipment is shown as a pictorial.</p> <p>20 Q. Okay. So apart from what was contained</p> <p>21 within Dr. Ermakov's report, you did not view the</p> <p>22 equipment or visit his laboratory prior to</p> <p>23 preparing any of your expert reports?</p> <p>24 A. Correct.</p> <p>25 Q. Okay. And what about Mr. Burns, how</p>
<p>22</p> <p>1 A. 2022.</p> <p>2 Q. Okay. So a little over a week ago?</p> <p>3 A. About two weeks ago, yes.</p> <p>4 Q. Okay. And that's the only conversation</p> <p>5 you've had with Dr. Ermakov.</p> <p>6 A. Yes.</p> <p>7 Q. What was the subject matter of your</p> <p>8 conversation?</p> <p>9 A. To get clarification and also to see the</p> <p>10 design of his study. I met him at his laboratory.</p> <p>11 Q. And where is his laboratory located?</p> <p>12 A. Rutgers University.</p> <p>13 Q. And what were you seeking clarification</p> <p>14 on?</p> <p>15 A. I wanted clarification on how he</p> <p>16 conducted the measurement for surface charge.</p> <p>17 Q. Okay. And then you also mentioned</p> <p>18 speaking to him or to see the design of his study.</p> <p>19 What did that involve?</p> <p>20 A. To visit his laboratory and see the</p> <p>21 equipment itself.</p> <p>22 Q. So you viewed the equipment that he</p> <p>23 used?</p> <p>24 A. Yes.</p> <p>25 Q. Did you watch it in operation?</p>	<p>24</p> <p>1 many times did you speak with him?</p> <p>2 A. One time.</p> <p>3 Q. And was that also an in-person visit?</p> <p>4 A. Yes.</p> <p>5 Q. And where is he located?</p> <p>6 A. Pennsylvania.</p> <p>7 Q. And where did you visit him</p> <p>8 specifically?</p> <p>9 A. At his laboratory.</p> <p>10 Q. And when was that visit?</p> <p>11 A. About a week later. So it would be --</p> <p>12 I'd have to look, but I think it was the 21st.</p> <p>13 Q. And apart from that meeting with</p> <p>14 Mr. Burns on October 21st -- actually, let me</p> <p>15 confirm. That's October 21st, 2022?</p> <p>16 A. 2022, correct.</p> <p>17 Q. Okay. So apart from that one meeting</p> <p>18 with Dr. Burns on October 21st, 2022, is it</p> <p>19 correct that you had no other conversations with</p> <p>20 Mr. Burns at any time regarding the subject matter</p> <p>21 of his testing?</p> <p>22 A. That's correct.</p> <p>23 Q. Did you ever meet with Dr. Ermakov or</p> <p>24 Mr. Burns to discuss the testing that they</p> <p>25 conducted on the Matrixx products?</p>

October 24, 2022

<p>25</p> <p>1 A. No.</p> <p>2 Q. And no conversations, telephone or Zoom,</p> <p>3 with Dr. Ermakov or Mr. Burns to discuss the</p> <p>4 testing conducted on the Matrixx products?</p> <p>5 A. No.</p> <p>6 Q. And what was the reason why you met with</p> <p>7 Mr. Burns on October 21st, 2022?</p> <p>8 A. To, again, view his equipment, how he</p> <p>9 conducted the test.</p> <p>10 Q. And prior to your visit on October 21st,</p> <p>11 2022, you had not viewed the equipment or</p> <p>12 personally overseen how he conducted the test?</p> <p>13 A. Correct.</p> <p>14 Q. And when you visited him on</p> <p>15 October 21st, 2022, did he repeat or replicate the</p> <p>16 testing that he did?</p> <p>17 A. He simply gave a demonstration of the</p> <p>18 equipment, but did not repeat the test.</p> <p>19 Q. And what equipment did he demonstrate?</p> <p>20 A. He used a NanoCoulomb Meter, and he used</p> <p>21 a Faraday cup.</p> <p>22 Q. And was he actually testing anything, or</p> <p>23 did he just show how the products operate?</p> <p>24 A. He just showed how the product operates.</p> <p>25 Q. So he didn't --</p>	<p>27</p> <p>1 just to feel more comfortable that my</p> <p>2 understanding of what testing they did was</p> <p>3 accurate.</p> <p>4 Q. And apart from the meetings with</p> <p>5 Mr. Burns and Dr. Ermakov in October of 2022, what</p> <p>6 else did you do to confirm your understanding of</p> <p>7 the accuracy of their testing?</p> <p>8 A. The only other items was to review in</p> <p>9 the literature how surface charge is measured.</p> <p>10 Q. So just to make sure I understand.</p> <p>11 Apart from your meetings with Dr. Burns --</p> <p>12 Mr. Burns and Dr. Ermakov to view the equipment</p> <p>13 that was used and a literature search concerning</p> <p>14 how surface charge is measured, you did not do</p> <p>15 anything else to confirm your understanding of the</p> <p>16 accuracy of the Burns and Ermakov testing;</p> <p>17 correct?</p> <p>18 A. That's correct.</p> <p>19 Q. Now, you also mentioned that you're not</p> <p>20 a specialist in that type of testing; is that</p> <p>21 correct?</p> <p>22 A. Yes.</p> <p>23 Q. And so I assume that's why you didn't do</p> <p>24 the testing yourself?</p> <p>25 A. Yes.</p>
<p>26</p> <p>1 A. Or how the -- I'm sorry, how the</p> <p>2 equipment operates.</p> <p>3 Q. Okay. So he didn't take a particular</p> <p>4 substrate and apply something to it and conduct</p> <p>5 any measurements?</p> <p>6 A. No.</p> <p>7 Q. Okay. And so I will also assume that he</p> <p>8 didn't demonstrate anything to you about how he</p> <p>9 used the pig's skin in his experiments?</p> <p>10 A. No.</p> <p>11 Q. And why -- well, did you ask to set up</p> <p>12 these meetings with Dr. Burns -- or sorry,</p> <p>13 Mr. Burns or Dr. Ermakov, or was it counsel's</p> <p>14 suggestion?</p> <p>15 A. I think it was a combination of getting</p> <p>16 clarification to see what actually transpired in</p> <p>17 the laboratory. So collaboration with both</p> <p>18 counsel as well as myself.</p> <p>19 Q. And why did you feel it was necessary to</p> <p>20 get that clarification?</p> <p>21 A. When you look at the reports of both</p> <p>22 Dr. Ermakov and Mr. Burns, there are pictures and</p> <p>23 descriptive terminology, but since I am not a</p> <p>24 specialist in that particular area, I wanted to</p> <p>25 see the equipment and how the equipment operates</p>	<p>28</p> <p>1 Q. Have you ever conducted that type of</p> <p>2 testing of the surface charge measurements?</p> <p>3 A. No.</p> <p>4 Q. Have you ever performed any testing to</p> <p>5 determine the conductivity of materials on a</p> <p>6 substrate?</p> <p>7 A. No.</p> <p>8 Q. Okay. Going backwards a little bit now.</p> <p>9 You also mentioned that you spoke with -- in</p> <p>10 connection with your work on this matter, that you</p> <p>11 also spoke with Mr. Kremen and Mr. Wahi; correct?</p> <p>12 A. Correct.</p> <p>13 Q. Do you recall speaking with anybody else</p> <p>14 other than those four individuals in connection</p> <p>15 with your work on this matter?</p> <p>16 A. No.</p> <p>17 Q. Okay. And how many times did you speak</p> <p>18 with Mr. Wahi?</p> <p>19 A. In person, two times.</p> <p>20 Q. Okay. And how about either by telephone</p> <p>21 or by video?</p> <p>22 A. Maybe eight times.</p> <p>23 Q. That's a lot of meetings. I'm not going</p> <p>24 to ask you to remember the details of every single</p> <p>25 one of them, but do you recall when the first</p>

October 24, 2022

<p>29</p> <p>1 meeting was?</p> <p>2 A. With Mr. Wahi?</p> <p>3 Q. Yeah.</p> <p>4 A. Regarding this matter, he contacted me,</p> <p>5 I believe it was November of 2021. I may be</p> <p>6 wrong, but I believe it was November.</p> <p>7 Q. And was that before or after you had</p> <p>8 been retained for the matter?</p> <p>9 A. Yes.</p> <p>10 Q. And what was the subject matter of that</p> <p>11 discussion?</p> <p>12 A. He approached me to utilize me as a</p> <p>13 consultant expert to evaluate the matter.</p> <p>14 Q. And what matter are you referring to?</p> <p>15 A. The matter of Trutek versus BlueWillow.</p> <p>16 Q. Okay. Did Mr. Wahi ever contact you or</p> <p>17 ask you to work as a consultant on any matter</p> <p>18 other than the ones directed to Matrixx and</p> <p>19 BlueWillow?</p> <p>20 A. No.</p> <p>21 Q. Okay. And when was the most recent</p> <p>22 meeting that you had with Mr. Wahi?</p> <p>23 A. By telephone.</p> <p>24 Q. And when was that?</p> <p>25 A. By telephone, it was Friday the 21st.</p>	<p>31</p> <p>1 prepared your expert reports in this matter?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And I assume the same is true</p> <p>4 about the second in-person meeting to talk about</p> <p>5 the Ermakov and Burns test, was that also within</p> <p>6 the last couple of weeks?</p> <p>7 A. Yes.</p> <p>8 Q. And what did you discuss with Mr. Wahi</p> <p>9 concerning the Ermakov and Burns test?</p> <p>10 A. The question of measurement being</p> <p>11 surface charge versus the statement that Dr. Amiji</p> <p>12 raised regarding conductivity.</p> <p>13 Q. Okay. And what did you discuss?</p> <p>14 A. Simply to have a better understanding of</p> <p>15 the measurement technique, whether it was, in</p> <p>16 fact, a measurement of surface charge, or was it</p> <p>17 conductivity that was measured.</p> <p>18 Q. And would it be fair to say that you had</p> <p>19 that conversation because you were unsure of that</p> <p>20 yourself based on your own experience?</p> <p>21 A. Just to get reinforcement of the</p> <p>22 subject.</p> <p>23 Q. And did that conversation change your</p> <p>24 understanding in any way --</p> <p>25 A. No.</p>
<p>30</p> <p>1 Q. And what was the purpose for that</p> <p>2 meeting?</p> <p>3 A. He asked me if I needed any further</p> <p>4 clarification on the matter.</p> <p>5 Q. And did you?</p> <p>6 A. No.</p> <p>7 Q. Okay. And when were the two in-person</p> <p>8 meetings that you had with Mr. Wahi?</p> <p>9 A. Well, one they were several weeks back</p> <p>10 to discuss, you know, at his facility just to,</p> <p>11 again, get clarification and then on another</p> <p>12 occasion to talk about the tests of Dr. Ermakov</p> <p>13 and Mr. Burns.</p> <p>14 Q. Okay. And what clarification were you</p> <p>15 seeking in that first meeting?</p> <p>16 A. The understanding of the claims that are</p> <p>17 utilized in the '802 patent by Mr. Wahi.</p> <p>18 Q. And that meeting you said was several</p> <p>19 weeks ago?</p> <p>20 A. Several weeks ago, yes.</p> <p>21 Q. So sometime in September or October of</p> <p>22 2022?</p> <p>23 A. Probably. I'm not certain to the exact</p> <p>24 date again. I'd have to look that up.</p> <p>25 Q. Okay. But it would have been after you</p>	<p>32</p> <p>1 Q. -- that you had prior --</p> <p>2 A. No.</p> <p>3 Q. So if you already had an understanding,</p> <p>4 why did you feel it necessary to confirm it?</p> <p>5 A. Again, the question of-- that I like to</p> <p>6 see things and also to ask questions of the people</p> <p>7 involved so that my understanding of the situation</p> <p>8 is exactly the same as how they see it.</p> <p>9 Q. And did you have any conversations with</p> <p>10 Mr. Wahi prior to preparing your expert reports?</p> <p>11 A. No.</p> <p>12 Q. So all of your meetings with Mr. Wahi,</p> <p>13 whether by phone or video or in person, have been</p> <p>14 sometime in just the last month or two of 2022; is</p> <p>15 that correct?</p> <p>16 A. Correct.</p> <p>17 Q. But that would be other than the first</p> <p>18 meeting --</p> <p>19 A. Yes.</p> <p>20 Q. -- where Mr. Wahi contacted you about</p> <p>21 the matter?</p> <p>22 A. Yes. I'm sorry I interrupted you. Yes,</p> <p>23 that's correct.</p> <p>24 Q. Okay. So as best you can remember, the</p> <p>25 next meeting that you had with Mr. Wahi would have</p>

October 24, 2022

<p>33</p> <p>1 been after you prepared your expert reports?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. What about your work on the</p> <p>4 Matrixx matter, did you ever have any</p> <p>5 conversations with Mr. Wahi in connection with</p> <p>6 that matter?</p> <p>7 A. No.</p> <p>8 Q. Okay. So apart from Mr. Kremen,</p> <p>9 Mr. Wahi, Mr. Burns, and Dr. Ermakov, is there</p> <p>10 anybody else that you had any discussions with,</p> <p>11 whether by phone or video or in person, regarding</p> <p>12 the subject matter of this dispute?</p> <p>13 A. No.</p> <p>14 Q. Did you speak with anybody else at</p> <p>15 Trutek?</p> <p>16 A. Well, not regarding the matter. There</p> <p>17 are people there, and so I did greet them, if</p> <p>18 that's what you're referring to. No. But no.</p> <p>19 The answer is no.</p> <p>20 Q. No, I'm talking -- yeah, I'm talking</p> <p>21 about substantive conversations about the issues</p> <p>22 raised in the matter.</p> <p>23 A. No.</p> <p>24 Q. Okay. Have you had any conversations</p> <p>25 with Mr. Haidri regarding this matter?</p>	<p>35</p> <p>1 referenced throughout your report?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And then with respect to</p> <p>4 commercial availability, you understand that</p> <p>5 NanoBio Protect is no longer being sold?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. So you also mentioned a Trutek</p> <p>8 product that's known as NasalGuard; correct?</p> <p>9 A. Yes.</p> <p>10 Q. So you're familiar with that product, as</p> <p>11 well?</p> <p>12 A. Yes, I use it.</p> <p>13 Q. And how many products are within that</p> <p>14 line?</p> <p>15 A. There are two products, NasalGuard</p> <p>16 scented and unscented, and then there's a spray</p> <p>17 product.</p> <p>18 Q. And those are the products that are sold</p> <p>19 in the United States?</p> <p>20 A. They're sold, I believe, in the United</p> <p>21 States as well as overseas.</p> <p>22 Q. Do you know if there are any other</p> <p>23 NasalGuard products sold overseas?</p> <p>24 A. I'm not familiar with that.</p> <p>25 Q. Okay. Do -- are you familiar with the</p>
<p>34</p> <p>1 A. No.</p> <p>2 Q. And did anyone else assist you in</p> <p>3 formulating your opinions provided in this matter?</p> <p>4 A. No.</p> <p>5 Q. I should also ask -- you mentioned the</p> <p>6 expert that's retained by my client, BlueWillow,</p> <p>7 and that's Dr. Amiji. Do you know him?</p> <p>8 A. No, I do not.</p> <p>9 Q. Dr. Lemmo, just very generally speaking,</p> <p>10 in your understanding, what was the nature of your</p> <p>11 assignment for this matter?</p> <p>12 A. The nature of my assignment was to</p> <p>13 provide expertise to demonstrate that the</p> <p>14 BlueWillow product was infringing on the patent of</p> <p>15 Trutek, the '802 patent, in the claims that</p> <p>16 NanoBio makes and is commercially available.</p> <p>17 Q. I'm sorry, what do you mean by "the</p> <p>18 claims that NanoBio makes"?</p> <p>19 A. The product that's marketed by</p> <p>20 BlueWillow as NanoBio Protect provides claims in</p> <p>21 their advertising and on their packaging that</p> <p>22 resemble the Trutek product that is known as</p> <p>23 NasalGuard.</p> <p>24 Q. Okay. So you're referring to the</p> <p>25 statements from BlueWillow's website that are</p>	<p>36</p> <p>1 formulation and the ingredients of the NasalGuard</p> <p>2 product?</p> <p>3 A. Yes.</p> <p>4 Q. Do they all have the same formulation?</p> <p>5 A. Yes, with the exception of the scented</p> <p>6 component. I'm referring primarily to the</p> <p>7 composition for the product that's sold in the</p> <p>8 tube.</p> <p>9 Q. And what's different about the scented</p> <p>10 composition?</p> <p>11 A. Just that it contains a scent as opposed</p> <p>12 to unscented.</p> <p>13 Q. And do you know what that scent is?</p> <p>14 A. I don't use the scented product, I'm</p> <p>15 sorry.</p> <p>16 Q. But other than the scent that's included</p> <p>17 in the scented formulation, it's your</p> <p>18 understanding that the formulation and composition</p> <p>19 of all the Trutek NasalGuard products are the</p> <p>20 same?</p> <p>21 A. Yes.</p> <p>22 Q. And are you familiar with the specific</p> <p>23 ingredients that are used in NasalGuard?</p> <p>24 A. Yes.</p> <p>25 Q. And how do you know that information?</p>

October 24, 2022

<p>37</p> <p>1 A. They're listed in the patent, the '802</p> <p>2 patent. And, also, if you visit the NasalGuard</p> <p>3 website and you click on the ingredients, they're</p> <p>4 listed there, as well.</p> <p>5 Q. And the ingredients that are listed on</p> <p>6 the website, do they provide the specific amounts</p> <p>7 of each ingredient that are included in the</p> <p>8 NasalGuard product?</p> <p>9 A. No.</p> <p>10 Q. So it's just a list of ingredients?</p> <p>11 A. Yes.</p> <p>12 Q. And do you know the specific amount of</p> <p>13 each ingredient that's used in NasalGuard?</p> <p>14 A. No.</p> <p>15 Q. Have you ever asked for that</p> <p>16 information?</p> <p>17 A. Excuse me?</p> <p>18 Q. Have you ever asked Trutek for that</p> <p>19 information?</p> <p>20 A. Yes.</p> <p>21 Q. Did they provide it to you?</p> <p>22 A. Yes. And percentages.</p> <p>23 Q. Okay.</p> <p>24 A. Not the quantification. So, in other</p> <p>25 words, what I'm saying is that of 100 percent,</p>	<p>39</p> <p>1 prepare for this deposition, I felt it necessary</p> <p>2 to have a better understanding of those amounts.</p> <p>3 Q. But you didn't think it was necessary to</p> <p>4 have an understanding of the amounts or the</p> <p>5 percentages at the time that you formed your</p> <p>6 opinions as stated in your reports?</p> <p>7 A. Well, the percentages were available to</p> <p>8 me at that time, but the amounts were not.</p> <p>9 Q. Okay. Let's back up. I thought you</p> <p>10 said that you received the percentages two weeks</p> <p>11 ago?</p> <p>12 A. Yes, but the percentages are on the</p> <p>13 website.</p> <p>14 Q. Okay. Earlier you testified that the</p> <p>15 website only has the list of ingredients, not the</p> <p>16 percentages; is that correct?</p> <p>17 A. Yes. All right. I misspoke, I'm sorry.</p> <p>18 Q. That's okay. I know it's -- it can be</p> <p>19 tough keeping track of everything, especially when</p> <p>20 I keep peppering you with questions. And, you</p> <p>21 know, I apologize for that. If you need me ever</p> <p>22 to restate my question just to make sure you</p> <p>23 understand it, I'm always happy to do that. Okay?</p> <p>24 A. Thank you. I appreciate that.</p> <p>25 Q. I also have the advantage of being able</p>
<p>38</p> <p>1 they'll tell me how much of every ingredient is,</p> <p>2 but not the specific quantities that are used.</p> <p>3 Q. Okay. So you have -- so you are aware</p> <p>4 of the percentage of the entire composition for</p> <p>5 each ingredient --</p> <p>6 A. Yes.</p> <p>7 Q. -- of NasalGuard?</p> <p>8 A. Yes.</p> <p>9 Q. And when was that information provided</p> <p>10 to you?</p> <p>11 A. Within the past two weeks.</p> <p>12 Q. So you did not have the information</p> <p>13 about the percentage of the individual ingredients</p> <p>14 within the NasalGuard products prior to preparing</p> <p>15 your reports; correct?</p> <p>16 A. Only the information that was available</p> <p>17 online.</p> <p>18 Q. And that would be just the list of</p> <p>19 ingredients without their percentages?</p> <p>20 A. That's correct.</p> <p>21 Q. And why did you ask for the percentages</p> <p>22 for the ingredients two weeks ago?</p> <p>23 A. For further clarification. These</p> <p>24 matters are usually -- they're usually private or</p> <p>25 considered confidential. And so in order to</p>	<p>40</p> <p>1 to see everything written out while you'll just</p> <p>2 have to listen. So I know it's difficult.</p> <p>3 Okay. So let's just back up to make</p> <p>4 sure I understand. The website includes the list</p> <p>5 of ingredients, but not the percentages; correct?</p> <p>6 A. That's correct.</p> <p>7 Q. And you had that information about the</p> <p>8 list of ingredients at the time of preparing your</p> <p>9 expert reports; correct?</p> <p>10 A. That's correct.</p> <p>11 Q. Okay. You did not have the percentages</p> <p>12 of the ingredients or the actual amounts of the</p> <p>13 ingredients at the time of preparing your reports;</p> <p>14 correct?</p> <p>15 A. Well, I relied on the information that</p> <p>16 was in the patent. So there are -- there is in</p> <p>17 the Wahi '802 patent, there are tables that</p> <p>18 include all of the ingredients or any permutation</p> <p>19 of those ingredients in the ten different -- I'd</p> <p>20 have to specifically, if I have it here, pull it</p> <p>21 up so that I could take a look at it.</p> <p>22 Q. Yeah, we can pull that up right now.</p> <p>23 A. Yeah.</p> <p>24 MS. PETERSON: Can we pull up the</p> <p>25 exhibit that was previously marked as Exhibit 2.</p>

October 24, 2022

<p>41</p> <p>1 THE REMOTE TECHNICIAN: Yes, stand by, 2 Counsel. 3 (Deposition Exhibit 2, Previously 4 Marked.) 5 THE REMOTE TECHNICIAN: It's on the 6 screen. 7 BY MS. PETERSON: 8 Q. Okay. And is it also -- Dr. Lemmo, if 9 you don't have a copy handy, if you go to the 10 chat, you should be able to open up a copy of the 11 patent, as well, directly if it's easier for you 12 to scroll through it. 13 A. All right. 14 Q. Or we could ask Jennifer to scroll 15 through to the tables. What would you prefer? 16 A. Yeah, if Jennifer can scroll through it, 17 it will make it easier for me because I'm opening 18 a lot of windows here, and I prefer not to. If 19 you scroll down -- 20 MS. PETERSON: Yeah, I think we want to 21 go to the fourth page of the PDF, starting with 22 Column 5. 23 BY MS. PETERSON: 24 Q. Are these the tables you were referring 25 to?</p>	<p>43</p> <p>1 A. Yes. 2 Q. Okay. So you had this information -- 3 certainly you had the '802 patent in your 4 possession and considered it in forming your 5 opinions as stated in your expert reports; right? 6 A. Yes. 7 Q. Okay. At the time you prepared your 8 reports, did you know which exact table of the 9 '802 patent matched with the NasalGuard 10 formulation? 11 A. No. 12 Q. Okay. And you also did not know the 13 specific percentages of the ingredients in 14 NasalGuard at the time that you prepared your 15 reports; correct? 16 A. Correct. 17 Q. Okay. Did you not think it was 18 necessary or important to have an understanding of 19 the percentages of the ingredients in NasalGuard 20 at the time that you formed your opinions provided 21 in this matter? 22 A. At the time I formed my opinion on the 23 matter, I focused on specific things that were 24 recited in the claims. 25 Q. Okay. But you didn't think it was</p>
<p>42</p> <p>1 A. These are the tables I'm referring to, 2 yes. 3 Q. Okay. And where -- specifically which 4 table contains the formulation for NasalGuard? 5 A. I don't have the exact reference to the 6 table for that because each is that it contains -- 7 it could contain this ingredient, the other 8 ingredient, et cetera. So I don't have that 9 information handy to say that it's Table 2 or 10 Table 4 or whatever. 11 Q. Okay. But to your understanding, does 12 at least one of these tables in the '802 patent 13 contain the exact list of ingredients in 14 NasalGuard? 15 A. I believe so. 16 Q. Okay. Now, if you look at the tables, 17 you see that for many of the ingredients that are 18 listed they're provided with a range, a percentage 19 range; correct? 20 A. Yes. 21 Q. Okay. So is it fair to say that with 22 respect to the specific NasalGuard formulation, 23 you don't know the precise percentage of the 24 ingredients, but rather just what ranges are 25 reported in the tables of the '802 patent?</p>	<p>44</p> <p>1 important to have an understanding of the specific 2 percentages of ingredients contained within 3 NanoBio Protect in the course of forming your 4 opinions; is that right? 5 MR. KREMEN: Objection to the form of 6 the question. 7 THE WITNESS: Can you just clarify that 8 for me, I'm sorry? 9 BY MS. PETERSON: 10 Q. So at the time that you formed your 11 opinions as stated in your reports, you didn't 12 think it was important to understand the specific 13 percentages of ingredients contained within 14 NanoBio Protect? 15 A. Yes. 16 Q. And what about the ingredients for -- 17 oh, I'm sorry, I might have -- I asked a bad 18 question there. Let me try that again. 19 At the time that you formed your 20 opinions as stated in your reports, you didn't 21 think it was important to understand the specific 22 percentages of ingredients contained within 23 Trutek's NasalGuard product? 24 A. Yes. 25 Q. And I think I had asked you that same</p>

October 24, 2022

<p>45</p> <p>1 question with respect to NanoBio Protect. So let 2 me just clarify that.</p> <p>3 When you prepared your -- formed your 4 opinions and prepared your expert reports, did you 5 know the specific ingredients that were contained 6 within NanoBio Protect?</p> <p>7 A. Not the specific ingredients, the -- 8 there was one ingredient that I primarily focused 9 on and that was benzalkonium chloride.</p> <p>10 Q. Okay. But you were not aware of any of 11 the other ingredients contained within NanoBio 12 Protect when forming your opinions and preparing 13 your expert reports; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And would it be fair to assume, then, 16 that you were also not aware of the percentages of 17 the ingredients contained within NanoBio Protect 18 when forming your opinions and preparing your 19 expert reports?</p> <p>20 A. Yes.</p> <p>21 Q. Did your assignment in this matter 22 include anything other than assessing and 23 providing opinions on whether NanoBio Protect 24 infringes the '802 patent claims?</p> <p>25 A. No.</p>	<p>47</p> <p>1 matter relating to those issues of invalidity, for 2 example, in response to Dr. Amiji's report?</p> <p>3 A. I believe I did.</p> <p>4 Q. And are all of your opinions on the 5 subject matters of -- or the issue of infringement 6 and patent validity, are those contained within 7 your three expert reports?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Let's go ahead -- actually, let's 10 skip that for now.</p> <p>11 Dr. Lemmo, what did you do to prepare 12 for your deposition?</p> <p>13 A. I reviewed the materials that are -- 14 that I wrote, and I reviewed the exhibits that you 15 provided or were provided to me by Mr. Kremen.</p> <p>16 Q. And what exhibits were those?</p> <p>17 A. The list of exhibits that were -- that 18 we referred to such as this one, '802 patent, as 19 well as the statements by Dr. Amiji in his reports 20 and the other documents that accompanied that 21 group. So there was a list of exhibits.</p> <p>22 Q. Okay. The list of exhibits, is that 23 something that was contained in one of the expert 24 reports in this matter, or is that a list that was 25 prepared by Mr. Kremen?</p>
<p>46</p> <p>1 Q. So you are not offering any opinions 2 concerning the validity of the '802 patent?</p> <p>3 A. The validity of the '802 patent relative 4 to the claims that it makes?</p> <p>5 Q. Well, you understand that a patent has a 6 number of claims at the end of it; right?</p> <p>7 A. Yes.</p> <p>8 Q. And those claims are what defines the 9 invention?</p> <p>10 A. Yes.</p> <p>11 Q. And is it your understanding that for an 12 infringement analysis, you have to compare those 13 claims and all of the elements to the accused 14 product to determine if they're all present?</p> <p>15 A. Yes.</p> <p>16 Q. And you also understand that those 17 patent claims could be found either by the patent 18 office or by a court or by a jury to be invalid 19 under any number of invalidity grounds?</p> <p>20 A. Yes.</p> <p>21 Q. So, for example, like obviousness, 22 anticipation, enablement, are you familiar with -- 23 or have you heard of those terms before?</p> <p>24 A. Yes, I've heard of the terms.</p> <p>25 Q. So are you offering any opinions in this</p>	<p>48</p> <p>1 A. It was the list that was supplied by 2 Mr. Kremen.</p> <p>3 Q. Okay. Did you review the deposition 4 transcript of Dr. Amiji to prepare for today's 5 deposition?</p> <p>6 A. Yes.</p> <p>7 Q. Now, the documents that were provided to 8 you that you reviewed in connection with your 9 preparation for this deposition, did you receive 10 any documents that you hadn't already seen before?</p> <p>11 MR. KREMEN: Objection to the form of 12 the question.</p> <p>13 THE WITNESS: I'm curious what you're 14 referring to. Because I did receive the patent, 15 which is one of the documents in the packet and 16 the statements from Dr. Amiji so that I could 17 provide a response to that. So I don't know if 18 there was anything else that you're referring to.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Okay. So -- well, I'll break it down. 21 So in preparation for your deposition, Mr. Kremen 22 provided you with some documents; correct?</p> <p>23 A. Correct.</p> <p>24 Q. Okay. Had you seen all of those 25 documents before in the course of your preparing</p>

October 24, 2022

<p>49</p> <p>1 your expert reports?</p> <p>2 A. Not all of them.</p> <p>3 Q. Okay. What documents were new?</p> <p>4 A. Some of the documents related to the</p> <p>5 terminology referring to the use of the word</p> <p>6 "inhibition" or "inhibiting" versus the term</p> <p>7 "preventing."</p> <p>8 Q. Okay. Anything else?</p> <p>9 A. Offhand, I would have to look at my list</p> <p>10 of documents to be specific. I'm using two</p> <p>11 computers because I keep everything on electronic.</p> <p>12 You have to forgive me.</p> <p>13 Q. No problem.</p> <p>14 A. But I have to pull it up on the other</p> <p>15 computer.</p> <p>16 The -- let's see, I have the notice of</p> <p>17 deposition. I believe that was for Dr. Amiji.</p> <p>18 Q. Okay. And, Dr. Lemmo, just to be clear</p> <p>19 here, I don't need you to read the list of</p> <p>20 everything.</p> <p>21 A. Oh.</p> <p>22 Q. I'm just wondering if there was anything</p> <p>23 new that you reviewed in preparation for your</p> <p>24 deposition that you had not already considered</p> <p>25 when forming your opinions and preparing your</p>	<p>51</p> <p>1 Q. So a clarification of his understanding</p> <p>2 of the claim terms as the named inventor on the</p> <p>3 patent?</p> <p>4 A. My understanding of what he stated in</p> <p>5 his claims.</p> <p>6 Q. Okay.</p> <p>7 A. So that we were -- I'm sorry. So that</p> <p>8 we were on the same page, that I, in fact, read</p> <p>9 the claims accurately.</p> <p>10 Q. Okay. And in terms of what -- when you</p> <p>11 say what he stated in the claims, you're talking</p> <p>12 about what Mr. Wahi stated in the claims as the</p> <p>13 named inventor on the patent?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Did you meet with Mr. Altman or</p> <p>16 have any phone conversations with Mr. Altman to</p> <p>17 prepare for your deposition?</p> <p>18 A. I don't know Mr. Altman.</p> <p>19 Q. Okay. You never --</p> <p>20 A. I've never spoken with Mr. Altman.</p> <p>21 Q. Okay.</p> <p>22 A. I don't know who he is.</p> <p>23 MR. KREMEN: Are we on any line of</p> <p>24 questioning that we can't interrupt for just a</p> <p>25 break? Because we've been going for an hour. I</p>
<p>50</p> <p>1 expert reports?</p> <p>2 A. No.</p> <p>3 Q. Okay. Thank you.</p> <p>4 Did you meet with anyone to prepare for</p> <p>5 your deposition today?</p> <p>6 A. No.</p> <p>7 Q. Did you meet with Mr. Kremen at all to</p> <p>8 prepare for the deposition?</p> <p>9 A. We spoke on the telephone.</p> <p>10 Q. Okay. How long did you speak with</p> <p>11 Mr. Kremen on the telephone?</p> <p>12 A. In total, maybe two to three hours.</p> <p>13 Q. Was anybody else present for that</p> <p>14 conversation?</p> <p>15 A. No.</p> <p>16 Q. Did you have any conversations with</p> <p>17 Mr. Wahi in preparation for your deposition?</p> <p>18 A. I believe so, yes.</p> <p>19 Q. And what did you discuss during that</p> <p>20 conversation?</p> <p>21 A. Again, it focused primarily on the '802</p> <p>22 patent and the statements of the claims. Just the</p> <p>23 clarification, once again.</p> <p>24 Q. The clarification of what exactly?</p> <p>25 A. The terms that are used in the claims.</p>	<p>52</p> <p>1 think Dr. Lemmo needs -- might need a little bit</p> <p>2 of a break, unless you want to continue on.</p> <p>3 MS. PETERSON: Yeah, let me just ask,</p> <p>4 like, one or two more questions, and then that</p> <p>5 will be a great breaking point.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. And then just to confirm, did you meet</p> <p>8 with or have any conversations with anybody else</p> <p>9 at Trutek to prepare for your deposition?</p> <p>10 A. No.</p> <p>11 Q. And approximately how much time did you</p> <p>12 spend reviewing the materials and the reports and</p> <p>13 the deposition transcript to prepare for your</p> <p>14 deposition today?</p> <p>15 MR. KREMEN: Objection to the form of</p> <p>16 the question.</p> <p>17 THE WITNESS: Can you just spell it out</p> <p>18 for me again?</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Yeah. How much time did you spend</p> <p>21 personally preparing for the deposition today?</p> <p>22 A. Oh, to read everything -- I'm a slow</p> <p>23 reader, I'm sorry. To read everything and just to</p> <p>24 review, to refresh my memory, because some of the</p> <p>25 documents are a few months old, I would say</p>

Transcript of Edward A. Lemmo, Ph.D.

14 (53 to 56)

October 24, 2022

<p style="text-align: right;">53</p> <p>1 five hours. But that's not a solid five hours.</p> <p>2 It's when I have the time to read different</p> <p>3 documents, I did.</p> <p>4 Q. Okay. Thank you.</p> <p>5 MS. PETERSON: Why don't we go off the</p> <p>6 record.</p> <p>7 THE VIDEOGRAPHER: We're going off the</p> <p>8 record. The time is now 11:03 a.m.</p> <p>9 (Recess from the record.)</p> <p>10 THE VIDEOGRAPHER: We're back on the</p> <p>11 record. The time is now 11:13 a.m.</p> <p>12 BY MS. PETERSON:</p> <p>13 Q. Welcome back, Dr. Lemmo.</p> <p>14 A. Thank you.</p> <p>15 Q. Have you been asked to provide any</p> <p>16 opinions on anything else beyond what has been</p> <p>17 contained in your three expert reports?</p> <p>18 A. No.</p> <p>19 Q. Okay. Now, you have submitted three</p> <p>20 reports in this case; right?</p> <p>21 A. It was three or four. I forget. But I</p> <p>22 think it was three.</p> <p>23 Q. Okay. So let's go ahead and mark and</p> <p>24 identify those for the record.</p> <p>25 MS. PETERSON: So we will mark as</p>	<p style="text-align: right;">55</p> <p>1 rebuttal of defendant's opening expert report of</p> <p>2 Mansoor M. Amiji?</p> <p>3 A. Yes.</p> <p>4 MS. PETERSON: And if we could turn to</p> <p>5 page 14 of the PDF, please.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Is that your signature, Dr. Lemmo?</p> <p>8 A. That's my signature, yes.</p> <p>9 Q. And the report is dated August 23rd,</p> <p>10 2022?</p> <p>11 A. Yes.</p> <p>12 MS. PETERSON: And then let's mark as</p> <p>13 Exhibit 15 a copy of Dr. Lemmo's reply expert</p> <p>14 report.</p> <p>15 (Lemmo Deposition Exhibit 15 was marked</p> <p>16 for identification and attached to the</p> <p>17 transcript.)</p> <p>18 THE REMOTE TECHNICIAN: Stand by.</p> <p>19 MR. KREMEN: Can we see a little more of</p> <p>20 that.</p> <p>21 Can we see a little bit more of what's</p> <p>22 on that page because all I see is the caption.</p> <p>23 MS. PETERSON: Yeah, can we scroll down</p> <p>24 a little bit on that page? There we go.</p> <p>25</p>
<p style="text-align: right;">54</p> <p>1 Exhibit 13 a copy of Dr. Lemmo's opening report.</p> <p>2 (Lemmo Deposition Exhibit 13 was marked</p> <p>3 for identification and attached to the</p> <p>4 transcript.)</p> <p>5 THE REMOTE TECHNICIAN: Stand by.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Dr. Lemmo, do you recognize Exhibit 13</p> <p>8 as your opening report?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And looking at page 16 of the PDF, is</p> <p>11 that your signature?</p> <p>12 A. I can only see the first page. If</p> <p>13 Jennifer can move that just to confirm it.</p> <p>14 Yes, that's my signature.</p> <p>15 Q. Okay.</p> <p>16 MS. PETERSON: And then let's mark as</p> <p>17 Exhibit 14 a copy of Dr. Lemmo's responsive</p> <p>18 report.</p> <p>19 (Lemmo Deposition Exhibit 14 was marked</p> <p>20 for identification and attached to the</p> <p>21 transcript.)</p> <p>22 THE REMOTE TECHNICIAN: Stand by.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. Dr. Lemmo, do you recognize Exhibit 14</p> <p>25 as your expert report responsive to and in</p>	<p style="text-align: right;">56</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Dr. Lemmo, do you recognize Exhibit 15</p> <p>3 as a copy of your reply expert report,</p> <p>4 specifically in reply to defendant's expert report</p> <p>5 on noninfringement?</p> <p>6 A. Yes.</p> <p>7 MS. PETERSON: And then if we could turn</p> <p>8 to page 13 of the PDF.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. Is that your signature, Dr. Lemmo?</p> <p>11 A. Yes.</p> <p>12 Q. And this report was dated September 29,</p> <p>13 2022; correct?</p> <p>14 A. Yes.</p> <p>15 Q. Okay.</p> <p>16 MR. KREMEN: Liane, are we going to</p> <p>17 include -- add as an exhibit his declaration on</p> <p>18 claim construction?</p> <p>19 MS. PETERSON: Yeah, I have that. I'll</p> <p>20 bring it up later.</p> <p>21 MR. KREMEN: Okay. Fine. I just wanted</p> <p>22 to know. So we have four documents total from</p> <p>23 Dr. Lemmo; right?</p> <p>24 MS. PETERSON: I'm focusing on the</p> <p>25 expert reports currently, but later we'll look at</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

October 24, 2022

<p>57</p> <p>1 the declaration.</p> <p>2 MR. KREMEN: Sure.</p> <p>3 BY MS. PETERSON:</p> <p>4 Q. Dr. Lemmo --</p> <p>5 MS. PETERSON: Actually, if we could go</p> <p>6 back and pull up Exhibit 14 now. This is the</p> <p>7 responsive report.</p> <p>8 And let's take a look at the second</p> <p>9 page. Yeah, right there. If we could scroll down</p> <p>10 a little bit to see the -- okay.</p> <p>11 BY MS. PETERSON:</p> <p>12 Q. So now, with respect to the validity of</p> <p>13 the '802 patent and responding to Dr. Amiji on</p> <p>14 these issues, Dr. Lemmo, you've offered four</p> <p>15 opinions in this responsive report; correct?</p> <p>16 A. Yes.</p> <p>17 Q. And those would be the level of skill in</p> <p>18 the art, scientific and technical aspects of the</p> <p>19 "hold" function of the '802 patent, enablement of</p> <p>20 the disclosure in the Rolf prior art</p> <p>21 publication --</p> <p>22 MS. PETERSON: And then if we scroll</p> <p>23 down to the next page.</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. -- the fourth topic is the relevance of</p>	<p>59</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Well, in reaching the opinions and</p> <p>3 conclusions that you've stated in the report, did</p> <p>4 you have to make any assumptions about anything?</p> <p>5 MR. KREMEN: Objection to the form of</p> <p>6 the question.</p> <p>7 THE WITNESS: I'm not really clear as</p> <p>8 far as what you're asking me.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. Okay. And just to be clear then, this</p> <p>11 report contains all of your opinions on</p> <p>12 invalidity, meaning you're not providing any --</p> <p>13 you have not been -- or you have not provided any</p> <p>14 opinions directed to anticipation of the '802</p> <p>15 patent?</p> <p>16 A. There's a report that talks about those</p> <p>17 terms relative to anticipation and obviousness.</p> <p>18 Is that what you're referring to?</p> <p>19 Q. I'm asking you if you have offered any</p> <p>20 opinions in this report or formed any opinions as</p> <p>21 shown in this report on the issue of anticipation?</p> <p>22 A. I believe I did.</p> <p>23 Q. Okay. Can you identify where that is?</p> <p>24 A. I'd have to scroll through the report.</p> <p>25 I'm only seeing -- I'm only seeing a short form</p>
<p>58</p> <p>1 the commercial success of Trutek's products.</p> <p>2 A. Yes.</p> <p>3 Q. Those are the four opinions that you've</p> <p>4 offered in response to Dr. Amiji's opening report?</p> <p>5 A. Yes.</p> <p>6 Q. Does Exhibit 14, your responsive report,</p> <p>7 contain all of the opinions that you have formed</p> <p>8 directed to the issues of validity of the '802</p> <p>9 patent?</p> <p>10 A. Yes.</p> <p>11 Q. And does your responsive report contain</p> <p>12 a complete statement of all the bases for your</p> <p>13 opinions?</p> <p>14 A. Yes.</p> <p>15 Q. Are there any statements in your</p> <p>16 responsive report that constitute the opinions of</p> <p>17 others?</p> <p>18 A. No.</p> <p>19 Q. And did you make any assumptions in</p> <p>20 formulating the opinions provided in your</p> <p>21 responsive report?</p> <p>22 MR. KREMEN: Objection to the form.</p> <p>23 THE WITNESS: I don't understand what</p> <p>24 you mean by "assumption."</p> <p>25</p>	<p>60</p> <p>1 here. And I believe this is -- I can't scroll</p> <p>2 through the report.</p> <p>3 THE REMOTE TECHNICIAN: Counsel, I can</p> <p>4 give him access to --</p> <p>5 MS. PETERSON: Okay. That's fine.</p> <p>6 THE REMOTE TECHNICIAN: -- control, and</p> <p>7 he can scroll on his own --</p> <p>8 MS. PETERSON: Sure.</p> <p>9 THE REMOTE TECHNICIAN: -- if that works</p> <p>10 for you.</p> <p>11 Dr. Lemmo, will that work for you?</p> <p>12 THE WITNESS: We'll try.</p> <p>13 THE REMOTE TECHNICIAN: Okay. Stand by.</p> <p>14 Now, you should be able to with your</p> <p>15 mouse take control. If you click on the document,</p> <p>16 you should be able to take control.</p> <p>17 THE WITNESS: A person having ordinary</p> <p>18 skill. We talked about the "hold" function. Just</p> <p>19 bear with me with this as I scroll through it.</p> <p>20 This is the discussion of Rolf and what</p> <p>21 commercial success indicates.</p> <p>22 Okay. Okay. I think I'm getting that</p> <p>23 confused with another document where I do talk</p> <p>24 about anticipation and obviousness.</p> <p>25</p>

October 24, 2022

<p>61</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Okay. What document is that? Because I</p> <p>3 haven't seen that in any of your reports.</p> <p>4 A. All right. No, I think Dr. Amiji talks</p> <p>5 about it, and I think I responded to it.</p> <p>6 Q. Okay. That's correct. Dr. Amiji did</p> <p>7 talk about anticipation --</p> <p>8 A. Yeah.</p> <p>9 Q. -- and obviousness.</p> <p>10 A. Yes.</p> <p>11 Q. However, you are not responding to those</p> <p>12 issues of anticipation or obviousness in your</p> <p>13 responsive report marked as Exhibit 14; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. Okay. And you also did not form any</p> <p>16 opinions responding to Dr. Amiji on issues of</p> <p>17 Section 101 or otherwise known as subject matter</p> <p>18 eligibility; is that correct?</p> <p>19 A. That's correct.</p> <p>20 Q. And you also did not form any opinions</p> <p>21 responding to Dr. Amiji on issues under</p> <p>22 Section 112, including written description,</p> <p>23 utility, or enablement; is that correct?</p> <p>24 A. That's correct.</p> <p>25 MR. KREMEN: Objection; calls for a</p>	<p>63</p> <p>1 A. No, I drafted them myself.</p> <p>2 Q. Are there any portions of any of the</p> <p>3 three reports that you did not draft yourself?</p> <p>4 A. No.</p> <p>5 Q. And I'm sorry, I might be going back</p> <p>6 over something we already covered, but just to</p> <p>7 make sure, you are aware that Trutek has retained</p> <p>8 Mr. Haidri to also opine on issues relating to</p> <p>9 invalidity.</p> <p>10 Is that your understanding?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Did you have any conversations or</p> <p>13 any meetings with Mr. Haidri when either he was</p> <p>14 working on his responsive report or when you</p> <p>15 prepared your responsive report?</p> <p>16 A. No, I've never had a conversation with</p> <p>17 Mr. Haidri.</p> <p>18 Q. Okay. Have you reviewed Mr. Haidri's</p> <p>19 report?</p> <p>20 A. No.</p> <p>21 Q. Do you know why you were asked to only</p> <p>22 address certain of the issues in response to</p> <p>23 Dr. Amiji on issues of invalidity?</p> <p>24 MR. KREMEN: Objection to the form of</p> <p>25 the question.</p>
<p>62</p> <p>1 legal conclusion.</p> <p>2 MS. PETERSON: We can take that exhibit</p> <p>3 down.</p> <p>4 BY MS. PETERSON:</p> <p>5 Q. Now, you've submitted two expert reports</p> <p>6 on issues of infringement. That would be your</p> <p>7 opening report and your reply report; right?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And do those two reports, your</p> <p>10 opening report and reply report, contain all of</p> <p>11 the opinions you formed on issues directed to</p> <p>12 infringement?</p> <p>13 A. Yes.</p> <p>14 Q. Do the opening and reply reports contain</p> <p>15 a complete statement of all of the bases for your</p> <p>16 opinions?</p> <p>17 A. Yes.</p> <p>18 Q. And are there any statements or opinions</p> <p>19 in your opening report or reply report that</p> <p>20 constitute the opinions of others?</p> <p>21 A. No.</p> <p>22 Q. Dr. Lemmo, did you draft your three</p> <p>23 expert reports that we just marked as Exhibit 13,</p> <p>24 14, and 15 by yourself, or did you have</p> <p>25 assistance?</p>	<p>64</p> <p>1 THE WITNESS: Maybe you could rephrase</p> <p>2 that for me.</p> <p>3 BY MS. PETERSON:</p> <p>4 Q. Okay. Well, you understand that</p> <p>5 Dr. Amiji offered opinions on invalidity of the</p> <p>6 '802 patent; right?</p> <p>7 A. Yes.</p> <p>8 Q. And you reviewed his report; correct?</p> <p>9 A. Yes.</p> <p>10 Q. But you did not form opinions in</p> <p>11 response to each of the issues raised by</p> <p>12 Dr. Amiji; correct?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. Do you know why you were asked to</p> <p>15 only address those four issues that are contained</p> <p>16 in your responsive report?</p> <p>17 MR. KREMEN: Objection to the form of</p> <p>18 the question.</p> <p>19 THE WITNESS: Maybe you could rephrase</p> <p>20 that for me again, sorry.</p> <p>21 BY MS. PETERSON:</p> <p>22 Q. Why did you only respond to those four</p> <p>23 issues in your responsive report?</p> <p>24 A. I think they were most important. Those</p> <p>25 were the four most important issues.</p>

October 24, 2022

<p>65</p> <p>1 Q. Those were the four most important</p> <p>2 issues in terms of having a disagreement with</p> <p>3 Dr. Amiji?</p> <p>4 MR. KREMEN: Objection to form.</p> <p>5 THE WITNESS: If we could just take a</p> <p>6 look at those four, not necessarily a disagreement</p> <p>7 with Dr. Amiji, but to express my opinion.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. Okay. So I just want to understand the</p> <p>10 basis for your understanding that those were the</p> <p>11 four most important issues. Why were they</p> <p>12 important to you?</p> <p>13 A. If we could -- you know, if we could</p> <p>14 pull those up, this way I could --</p> <p>15 Q. Yeah, let's go back to Exhibit --</p> <p>16 A. That would be great.</p> <p>17 Q. Yeah.</p> <p>18 A. Yeah, that would be great.</p> <p>19 MS. PETERSON: Exhibit 14 -- Exhibit 14,</p> <p>20 page 2, please.</p> <p>21 THE WITNESS: Yeah, that will make it</p> <p>22 easier for me. Okay.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. Actually, you know what, let me ask you</p> <p>25 another question first. For these four issues you</p>	<p>67</p> <p>1 Exhibit 16 as a copy of your CV?</p> <p>2 A. Yes.</p> <p>3 Q. Do you have any changes to make to it,</p> <p>4 or is it current?</p> <p>5 A. That's current.</p> <p>6 Q. Do you have any patents?</p> <p>7 A. No.</p> <p>8 Q. And have you ever published any</p> <p>9 articles?</p> <p>10 A. Yes.</p> <p>11 Q. Scientific papers?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. Are those publications listed in</p> <p>14 your CV? I don't think they are.</p> <p>15 A. I don't think so.</p> <p>16 Q. Okay. Approximately how many papers</p> <p>17 have you published over the last -- or in general,</p> <p>18 do you know a rough number?</p> <p>19 A. Not that many. The publications related</p> <p>20 to my degrees, my dissertation research, as well</p> <p>21 as my master's degree, and also publications that</p> <p>22 were either in the form of newsletters, booklets</p> <p>23 that were asked of me by corporations to write or</p> <p>24 internal documents. So in total, I would say 10</p> <p>25 to 15 would be a maximum number.</p>
<p>66</p> <p>1 addressed in your responsive report, did you</p> <p>2 identify these issues, or were you asked by</p> <p>3 counsel to provide your opinion on these four</p> <p>4 topics?</p> <p>5 A. I think it was a combination of both.</p> <p>6 Q. Did counsel for Trutek ask you to</p> <p>7 provide opinions on any other issues beyond these</p> <p>8 four with respect to the invalidity of the patent?</p> <p>9 A. Not to my recollection, no.</p> <p>10 Q. Okay. Yeah, I think that answers my</p> <p>11 question.</p> <p>12 MS. PETERSON: So we can take that down.</p> <p>13 THE WITNESS: Okay.</p> <p>14 MS. PETERSON: Let's mark as another</p> <p>15 Exhibit -- we'll mark this as Exhibit 16. Let's</p> <p>16 pull up a copy of Dr. Lemmo's CV.</p> <p>17 (Lemmo Deposition Exhibit 16 was marked</p> <p>18 for identification and attached to the</p> <p>19 transcript.)</p> <p>20 MS. PETERSON: Jennifer, this is</p> <p>21 identified as No. 6 in the file.</p> <p>22 THE REMOTE TECHNICIAN: Yes, I see it.</p> <p>23 Thank you.</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. Okay. Dr. Lemmo, do you recognize</p>	<p>68</p> <p>1 Q. And what about any -- like any</p> <p>2 conferences, did you -- have you ever prepared or</p> <p>3 given any abstracts or any presentations at</p> <p>4 conferences within your field of study?</p> <p>5 A. Yes.</p> <p>6 Q. Approximately how many?</p> <p>7 A. A presentation of my research work for</p> <p>8 my Ph.D., as well as my research work on my</p> <p>9 master's degree. I've also served as an invited</p> <p>10 speaker at various conferences, professional</p> <p>11 meetings. But, again, it's not -- it's based upon</p> <p>12 materials that were part of the conference. So,</p> <p>13 for example, I would give lectures on various</p> <p>14 aspects of nutrition or aspects of the corporate</p> <p>15 sector and how science and regulatory affairs are</p> <p>16 integrated into the development of products.</p> <p>17 Q. Okay. And just to confirm, those aren't</p> <p>18 listed in your CV either; right?</p> <p>19 A. That's correct. I did not list that.</p> <p>20 Q. Okay. So, Dr. Lemmo, I believe you</p> <p>21 described yourself as a consumer health care</p> <p>22 corporate consultant; is that right?</p> <p>23 A. Yeah, a consumer health care related to</p> <p>24 products that are sold over-the-counter, OTC</p> <p>25 products primarily.</p>

October 24, 2022

<p>69</p> <p>1 Q. Okay. And would that primarily relate</p> <p>2 to products such as nutritional supplements and</p> <p>3 vitamins, so products in those categories?</p> <p>4 A. Yes, those as well as some other</p> <p>5 categories, primarily in the area of homeopathic</p> <p>6 medicines and some other roles that I've been</p> <p>7 involved in in the -- for example, in BioBalance,</p> <p>8 a probiotic product that was used in the treatment</p> <p>9 of specific kinds of conditions, gastrointestinal</p> <p>10 disorders.</p> <p>11 Q. And what do you -- just so we can be</p> <p>12 clear on terminology, what are you referring to as</p> <p>13 homeopathic medicines?</p> <p>14 A. Homeopathic medicine is the use of</p> <p>15 natural remedies. They're extracts of botanicals.</p> <p>16 These are used as tinctures. And in Eastern</p> <p>17 European traditions, homeopathy is a very</p> <p>18 significant part of medicine. And so I've given</p> <p>19 lectures on homeopathic medicine, you know, both</p> <p>20 in a corporate setting as well as in professional</p> <p>21 meetings.</p> <p>22 Q. Okay. And you have a bachelor's degree</p> <p>23 in chemistry; right?</p> <p>24 A. That's correct.</p> <p>25 Q. And a master's and a Ph.D. in nutrition</p>	<p>71</p> <p>1 had over that time frame, from 2007 to the</p> <p>2 present?</p> <p>3 A. Consultant -- well, the only one that's</p> <p>4 not there is Trutek. So in 2011, I served as a</p> <p>5 consultant for Matrixx Initiatives.</p> <p>6 Q. Okay.</p> <p>7 A. And then the -- that's correct. There's</p> <p>8 no other consulting that was done other than those</p> <p>9 two. Because it was mostly academic work that I</p> <p>10 did.</p> <p>11 Q. Okay. So from 2011 to the present, you</p> <p>12 have the consulting work obviously with Trutek,</p> <p>13 and then the rest of your, I guess we'll just say</p> <p>14 employment, for use of a better term, that's been</p> <p>15 with respect to your academic teaching</p> <p>16 assignments?</p> <p>17 A. That's correct. Because for the most</p> <p>18 part I've been retired since 2000 -- let's see,</p> <p>19 2018. So I reached retirement age in 2018. And</p> <p>20 so I simply do consulting work at this point. I</p> <p>21 no longer do academic work.</p> <p>22 Q. Okay. And then have you done any other</p> <p>23 consulting work since 2018 apart from the</p> <p>24 consulting services provided to Trutek?</p> <p>25 A. No.</p>
<p>70</p> <p>1 science; right?</p> <p>2 A. That's correct.</p> <p>3 Q. Okay. And it looks like you have for</p> <p>4 the last 15 years, primarily, you've been acting</p> <p>5 as a consultant for a consumer health care</p> <p>6 corporate consultant?</p> <p>7 A. Yes, and also working in academia, you</p> <p>8 know, as an either part-timer or full time for a</p> <p>9 college or university in the vicinity.</p> <p>10 Q. Okay. And those -- the college teaching</p> <p>11 experience that you have, that is listed in your</p> <p>12 CV; right?</p> <p>13 A. Yes.</p> <p>14 Q. Is that complete?</p> <p>15 A. Yes, it is.</p> <p>16 Q. Okay. Now, looking --</p> <p>17 MS. PETERSON: Could we scroll down to</p> <p>18 the third page.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Do you see there's a heading here that</p> <p>21 says "Corporate Consulting Experience"?</p> <p>22 A. Yes.</p> <p>23 Q. Now, I only see one consulting</p> <p>24 assignment here listed within that time frame</p> <p>25 after 2007. Is that the only consulting job you</p>	<p>72</p> <p>1 Q. Okay. So looking at this most recent</p> <p>2 corporate consulting experience you have listed</p> <p>3 for Matrixx, I see there's one item identified as</p> <p>4 relating to an oral zinc product; is that correct?</p> <p>5 A. Yes, that's correct.</p> <p>6 Q. Okay.</p> <p>7 MS. PETERSON: If we could go back and</p> <p>8 look at the first page.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. So the consumer health care corporate</p> <p>11 consultant work from 2007 to the present, that's</p> <p>12 been focused on the Matrixx assignment and the</p> <p>13 work with Trutek; right?</p> <p>14 A. Correct. Or if a colleague or someone I</p> <p>15 knew in the corporate sector reached out to me to</p> <p>16 review a product and just to provide them with</p> <p>17 some guidance, particularly for claim construction</p> <p>18 or regulatory affairs, it might have been</p> <p>19 something that surfaced but it was nothing</p> <p>20 significant and I did not really include that.</p> <p>21 Q. Okay. You provided consulting services</p> <p>22 for claim construction? Did I hear you correctly?</p> <p>23 A. Yes, claim construction on a product.</p> <p>24 Primarily, if a company wants to market a product,</p> <p>25 I'll use an example of a dietary supplement, there</p>

October 24, 2022

<p>73</p> <p>1 are guidelines that the company must follow in</p> <p>2 order to make the claim that it has adequate</p> <p>3 substantiation attached to the claim.</p> <p>4 Q. I understand. Okay.</p> <p>5 A. So that's essentially it.</p> <p>6 Q. Okay. Thank you.</p> <p>7 Okay. So then prior to that, you were</p> <p>8 with BioBalance Corporation, and that involved the</p> <p>9 probiotic product you mentioned earlier?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And then it looks like you were</p> <p>12 with Wyeth Consumer Healthcare in product</p> <p>13 development for about six years; right?</p> <p>14 A. That's correct. Until the company was</p> <p>15 purchased by Pfizer.</p> <p>16 Q. Okay. And your work at Wyeth with</p> <p>17 respect to product development, that was focused</p> <p>18 on, it looks like, a few brands: Solgar, Centrum</p> <p>19 and Caltrate; correct?</p> <p>20 A. That's correct.</p> <p>21 Q. Those are vitamins or calcium</p> <p>22 supplements?</p> <p>23 A. That's correct.</p> <p>24 Q. And then when you say that you managed</p> <p>25 the product development of those brands, what did</p>	<p>75</p> <p>1 new formulations or products in the laboratory?</p> <p>2 MR. KREMEN: Objection to form.</p> <p>3 THE WITNESS: Well, it did include</p> <p>4 supervision of the laboratory, as well as the</p> <p>5 formulation of the product within the</p> <p>6 manufacturing sector. So if I could elaborate, my</p> <p>7 function was in the creation of a new product to</p> <p>8 work with both the analytical segment of the</p> <p>9 company, and those were more of the pharmaceutical</p> <p>10 people, as well as the manufacturing element of</p> <p>11 the concept so that the concept, the idea, would</p> <p>12 come to fruition as a finished product.</p> <p>13 BY MS. PETERSON:</p> <p>14 Q. Okay. Thank you.</p> <p>15 And it looks like prior to that you were</p> <p>16 with General Nutrition Centers, GNC?</p> <p>17 A. Yes.</p> <p>18 Q. And your work there was directed to</p> <p>19 nutritional supplements?</p> <p>20 A. Primarily, yes. The General Nutrition</p> <p>21 Centers, Incorporated, the retail outlets coast to</p> <p>22 coast, had a major presence particularly relative</p> <p>23 to the passage of the Dietary Supplement Health</p> <p>24 and Education Act, known as DSHA, and the company</p> <p>25 needed representation with respect to that</p>
<p>74</p> <p>1 that involve?</p> <p>2 A. Well, it involves either the creation of</p> <p>3 new product -- if I could just backtrack, Solgar</p> <p>4 Vitamin and Herb Company was acquired by Wyeth</p> <p>5 Consumer Healthcare around the time -- I believe</p> <p>6 it was 1998, and I was hired by the company to</p> <p>7 kind of head up their scientific division for that</p> <p>8 division.</p> <p>9 In addition to that, I was employed by</p> <p>10 Wyeth in their business development unit in the</p> <p>11 evaluation any products that would be coming into</p> <p>12 the OTC area as one of the scientists who worked</p> <p>13 on that team.</p> <p>14 So I provided expertise, opinions on the</p> <p>15 validity of the products that would be presented</p> <p>16 to be incorporated into the portfolio, as well as</p> <p>17 if the company was interested in doing</p> <p>18 acquisitions of the business or acquisition of a</p> <p>19 product, I would be on that review team.</p> <p>20 Q. Okay. And so that work focused on</p> <p>21 evaluating the technical aspects of the products?</p> <p>22 A. Yes.</p> <p>23 Q. And would it be fair to say that in the</p> <p>24 course of your product development work while at</p> <p>25 Wyeth, it was not focused on actually developing</p>	<p>76</p> <p>1 litigation being finalized. So I played a major</p> <p>2 role for them in that respect.</p> <p>3 But I also helped in the development or</p> <p>4 the change of focus of the product line so that it</p> <p>5 would incorporate more of the kinds of products</p> <p>6 that you see at GNC in today's market as opposed</p> <p>7 to at the time that I started there.</p> <p>8 Q. And what were those new kinds of</p> <p>9 products that were being sold by GNC?</p> <p>10 A. Well, I'll give you one example. The</p> <p>11 product that was known as Cold-EEZE, which is a</p> <p>12 zinc lozenge, very similar to the Zicam product,</p> <p>13 was presented to me by the inventor. And he</p> <p>14 wanted to market that product in a retail outlet.</p> <p>15 And so I had to review his data to substantiate</p> <p>16 the claims that he was making about his product.</p> <p>17 GNC did not decide to take that product into their</p> <p>18 portfolio, and so they had to market it elsewhere.</p> <p>19 Q. Okay. And that would be an example of</p> <p>20 what you were describing earlier as a homeopathic</p> <p>21 medicine?</p> <p>22 A. Yes. And they have a line of</p> <p>23 homeopathic products, as well, tinctures and other</p> <p>24 types of products along those lines that might</p> <p>25 have been used as more of the cosmetic area. And</p>

October 24, 2022

<p style="text-align: right;">77</p> <p>1 so you see that today in a lot of products where 2 extracts of botanicals, et cetera, which are based 3 on homeopathic medicine may be found in commercial 4 products in today's market. 5 Q. Okay. And then your work at Pall 6 Biomedical Products, that looks like it was 7 focused more on the device side; is that correct? 8 A. Yes, Pall Biomedical Products was a very 9 interesting assignment for me. Dr. David Pall was 10 an expert in filtration systems. And the company 11 was looking to move into the area of application 12 in the biomedical field, so biomedical products or 13 medical devices, so to speak. 14 And so the technology that Dr. Pall had 15 created in his filtration technology was to be 16 extended for applications primarily in a hospital, 17 either in filtration of blood and other fluids or 18 in the filtration of air particles, heat and 19 moisture exchanges that would be given to a 20 patient during the time that they were under 21 anesthesia. 22 Q. And then, lastly, looking at ICN 23 Pharmaceuticals, this looks like another 24 assignment focused on nutritional supplements? 25 A. Yes, that was. ICN Pharmaceutical</p>	<p style="text-align: right;">79</p> <p>1 HEALON, which is hyaluronate acid. And it was 2 primarily used for injecting into the joints of 3 racehorses. And so my job was to do the blood 4 analysis work, the samples, in the laboratory that 5 I had at Rutgers University while I was a graduate 6 student. 7 Q. Okay. And then looking at the rest of 8 this page, your earlier consulting experience, 9 would it be fair to say that that also generally 10 relates to vitamins and other dietary supplements? 11 A. Yes, and primarily on a technical basis. 12 Again, as I said, many of these products -- excuse 13 me, many of these products were in need of 14 technical support, whether it was documentation or 15 support for claims that the company wanted to 16 make, as well as advisement relevant to regulatory 17 matters, and that's where I provided the help. 18 Q. Okay. Thank you for that. 19 So is it correct that you do not have 20 any experience in the formulation or development 21 of oil-in-water nanoemulsions? 22 MR. KREMEN: Objection to the form of 23 the question. 24 THE WITNESS: Well, let me just use the 25 example where in the vitamin industry, there are</p>
<p style="text-align: right;">78</p> <p>1 wanted to branch out into the traditional area, 2 and so I was retained with the acquisition of what 3 was known as Faraday Laboratories, it no longer 4 exists, and brands that were primarily marketed to 5 allied health professionals. And the majority of 6 them would be in the chiropractic market. 7 Q. And then on the next page, it looks like 8 there's one other piece of employment listed -- 9 MR. KREMEN: Excuse me. The only thing 10 that's visible on the screen is the first page of 11 his résumé. 12 MS. PETERSON: Okay. Let's look at 13 page 3, please. Can we turn to page 3. 14 BY MS. PETERSON: 15 Q. At the top here, it looks like this was 16 your first employment experience listed at 17 Pharmacia Laboratories. It looks like this was 18 following your undergraduate degree? 19 A. Actually, this was during the time of my 20 master's degree. 21 Q. Okay. 22 A. So I had an undergraduate degree, but 23 this was a job that -- because Pharmacia was very 24 closely located near Rutgers University, and they 25 were interested in developing a product known as</p>	<p style="text-align: right;">80</p> <p>1 products such as the fat soluble vitamins that 2 are -- utilize a delivery system that's known as a 3 micellar complex. And so you take a fat soluble 4 vitamin, and it's treated with surfactants or 5 whatever in order to make it more water soluble or 6 more miscible with the human body. 7 BY MS. PETERSON: 8 Q. Okay. 9 A. So that's essentially what my experience 10 has been. 11 Q. Okay. And just to confirm, those 12 products, those would be administered orally? 13 A. Yes. 14 Q. Not through the nasal passages? 15 A. No. 16 Q. Okay. And did you -- I mean, were you 17 aware of these fat soluble vitamins just as a 18 course of your work within the industry, or did 19 you actually develop and formulate any yourself? 20 A. No, they were developed by other people, 21 and I was -- I served as a scientific liaison to 22 give an explanation of the technology of these 23 other companies for the parent company that I was 24 employed by. 25 Q. Oh, okay. So you became aware of these</p>

October 24, 2022

<p>1 as a result of investigating them for potential 2 acquisition by your employer? 3 A. That's correct. 4 Q. Okay. And so that would be the extent 5 of your experience that you said related to 6 oil-in-water nanoemulsions? 7 MR. KREMEN: Objection to the form of 8 the question. 9 THE WITNESS: I would say that my 10 experience with that was twofold. That's the 11 corporate side of it. But, also, on a personal 12 level, in order to document what's going on, this 13 is not a very simplistic concept for people in 14 marketing and people in corporate positions. So I 15 had to do a lot of investigating on my own about 16 the technology. So I had to learn the technology 17 myself in order to present it on behalf of that 18 company. 19 BY MS. PETERSON: 20 Q. And what company was that presented to? 21 A. Well, that was presented in several 22 companies. It was presented in ICN 23 pharmaceutical, but it was also presented at 24 General Nutrition Centers. 25 Q. Okay. And then I assume you don't have</p>	<p>81 83 1 consulted for Matrixx was an oral zinc lozenge 2 product; correct? 3 A. Actually, it was -- at the time the 4 portfolio included a nasal product, but I focused 5 primarily on the oral zinc product. 6 Q. And you don't have any experience in the 7 formulation or development of pharmaceutical 8 compositions that are intended to inhibit or 9 prevent infection caused by various bacteria? 10 MR. KREMEN: Objection to the form of 11 the question. 12 THE WITNESS: That experience, no. The 13 experience -- hands-on experience in development, 14 no. 15 BY MS. PETERSON: 16 Q. And is it correct that you do not have 17 any experience in the formulation or development 18 of pharmaceutical compositions to inhibit or 19 prevent infection caused by viruses? 20 A. That's correct. 21 Q. Apart from your work on these two 22 litigation matters for Trutek, is it correct that 23 you do not have any experience in the formulation 24 or development of pharmaceutical compositions to 25 inhibit or prevent the nasal inhalation of any</p>
<p>82 1 any experience in the formulation or development 2 of oil-in-water nanoemulsions for nasal 3 administration; correct? 4 A. That's correct. 5 Q. Okay. And you do not have any 6 experience in the formulation or development of 7 oil-in-water nanoemulsions for use as a vaccine 8 adjuvant? 9 A. That's correct. 10 Q. And it sounds like you don't have any 11 experience in the formulation or development of 12 pharmaceutical compositions that are intended to 13 be administered nasally to humans? 14 MR. KREMEN: Objection to the form of 15 the question. 16 THE WITNESS: Maybe you could rephrase 17 that for me. 18 BY MS. PETERSON: 19 Q. You do not have any experience in the 20 formulation of pharmaceutical compositions that 21 are intended to be administered nasally to humans? 22 A. My only exposure to that was with the 23 activities at Matrixx and Zicam because Zicam had 24 a product that was administered nasally. 25 Q. Okay. But the product that you</p>	<p>84 1 type of particulate matter into the nose? 2 MR. KREMEN: Objection to the form of 3 the question. 4 THE WITNESS: If I refer back to my 5 experience with Pall Corporation, with the 6 development of a medical device that was used for 7 the respiratory system, that's the only experience 8 that I can recall. 9 BY MS. PETERSON: 10 Q. And that would be -- since it's a 11 medical device, that wouldn't be a composition 12 that's applied directly to a patient's skin; 13 correct? 14 A. No, it's applied directly over the nose 15 as a mask. 16 Q. And I saw in your CV for Pall Biomedical 17 that -- is it correct that this work was related 18 to addressing issues of patients breathing cold 19 dry gas during surgery? 20 A. That's correct. 21 Q. Okay. Is it correct that you do not 22 have any experience in the formulation or 23 development of pharmaceutical products intended to 24 kill or inactivate bacteria or viruses within a 25 human nasal passage?</p>

October 24, 2022

<p>85</p> <p>1 MR. KREMEN: Objection to the form of</p> <p>2 the question.</p> <p>3 THE WITNESS: I have no experience of</p> <p>4 development of those types of pharmaceuticals.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. And you do not have any experience in</p> <p>7 the formulation or development of vaccines?</p> <p>8 A. That's correct.</p> <p>9 Q. And apart from your work in connection</p> <p>10 with this matter, you do not have any experience</p> <p>11 in the formulation of pharmaceutical products</p> <p>12 intended to capture and hold particulate matter</p> <p>13 within the nose or nasal passage?</p> <p>14 MR. KREMEN: Objection to the form of</p> <p>15 the question.</p> <p>16 THE WITNESS: Just -- can you repeat</p> <p>17 that question?</p> <p>18 BY MS. PETERSON:</p> <p>19 Q. So apart from the work that you're doing</p> <p>20 in connection with these litigations --</p> <p>21 A. Yes.</p> <p>22 Q. -- you do not have any experience in</p> <p>23 formulating or developing pharmaceutical products</p> <p>24 intended to capture and hold particulate matter</p> <p>25 within the nose or nasal passages?</p>	<p>87</p> <p>1 A. Yes, it relates to anything that I've</p> <p>2 been employed. That's how I'm answering yes. So</p> <p>3 it's -- these are not situations where during the</p> <p>4 time that I was employed that I had experience</p> <p>5 with that type of application.</p> <p>6 Q. Okay. Thank you.</p> <p>7 And I would assume then that in addition</p> <p>8 to not having the experience in developing or</p> <p>9 formulating those types of products for those</p> <p>10 applications that you also wouldn't have any</p> <p>11 experience in testing those products either?</p> <p>12 MR. KREMEN: Objection to the form of</p> <p>13 the question.</p> <p>14 THE WITNESS: Testing the products would</p> <p>15 not be part of my assignments in any of my</p> <p>16 employment.</p> <p>17 BY MS. PETERSON:</p> <p>18 Q. Okay. And that would include any in</p> <p>19 vitro testing?</p> <p>20 A. To my knowledge, yes.</p> <p>21 Q. Okay. So in vitro testing would not</p> <p>22 have been part of your assignments for any of your</p> <p>23 work?</p> <p>24 A. Correct.</p> <p>25 Q. Okay. And in vivo testing in animals,</p>
<p>86</p> <p>1 A. Yes.</p> <p>2 MR. KREMEN: Objection to the form of</p> <p>3 the question.</p> <p>4 THE WITNESS: Yes, just simply what I</p> <p>5 referred to as far as the mask in Pall Biomedical.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Okay. And that was a physical barrier,</p> <p>8 the mask; correct?</p> <p>9 A. Yes, that's a filtration device of a</p> <p>10 certain dimension to trap particles.</p> <p>11 Q. And is it correct that you do not have</p> <p>12 any experience in formulating or developing</p> <p>13 pharmaceutical products intended to capture and</p> <p>14 hold particulate matter within the nasal passage</p> <p>15 by means of electrostatic attraction?</p> <p>16 MR. KREMEN: Objection to the form of</p> <p>17 the question.</p> <p>18 THE WITNESS: Yes.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. And just to confirm, when you say yes,</p> <p>21 that means yes, that's correct, you do not have</p> <p>22 the experience?</p> <p>23 A. Yes, that's correct.</p> <p>24 Q. Okay. And the same is true for my other</p> <p>25 answers?</p>	<p>88</p> <p>1 that also would not be part of your work</p> <p>2 experience?</p> <p>3 A. My only experience in vivo would relate</p> <p>4 to what I did at Pharmacia with the blood testing</p> <p>5 and for my doctorate and my master's degree where</p> <p>6 I did experimentation with animals.</p> <p>7 Q. And what type of experimentation were</p> <p>8 you doing as part of your thesis work?</p> <p>9 A. Body compositional analysis of the</p> <p>10 animals under specific types of dietary</p> <p>11 restrictions as well as focusing on calcium</p> <p>12 nutriture as it relates to the development of</p> <p>13 osteoporosis under stressful conditions.</p> <p>14 Q. Okay. So that work also did not involve</p> <p>15 any testing or development or -- development of</p> <p>16 products intended to inhibit or prevent infection</p> <p>17 of disease in those animals?</p> <p>18 A. No.</p> <p>19 Q. Okay. Dr. Lemmo, do you consider</p> <p>20 yourself to have any particular expertise in</p> <p>21 patent law?</p> <p>22 A. No.</p> <p>23 Q. And you do not have an economics degree?</p> <p>24 A. Economics?</p> <p>25 Q. Yeah.</p>

October 24, 2022

<p style="text-align: right;">89</p> <p>1 A. No, no economics degree.</p> <p>2 Q. You don't have an accounting degree?</p> <p>3 A. No.</p> <p>4 Q. And then with respect to your sales and</p> <p>5 marketing experience from your prior employment,</p> <p>6 was that focused on making sure that the claims</p> <p>7 made in those marketing or advertising materials</p> <p>8 complied with applicable regulations?</p> <p>9 MR. KREMEN: Objection to the form of</p> <p>10 the question.</p> <p>11 THE WITNESS: Well, let me explain. It</p> <p>12 did apply to the regulations, but it also applied</p> <p>13 to having adequate substantiation, scientific</p> <p>14 substantiation for any of the claims associated</p> <p>15 with the products that were marketed so that</p> <p>16 those -- the science evolves going forward, and so</p> <p>17 claims will expire. And my function was to make</p> <p>18 certain that the claims were substantiated in</p> <p>19 light of any new developments.</p> <p>20 BY MS. PETERSON:</p> <p>21 Q. So the marketing and advertising work</p> <p>22 was focused on substantiating the claims that were</p> <p>23 made in those materials with respect to the</p> <p>24 products?</p> <p>25 A. Yes, and also training the marketing and</p>	<p style="text-align: right;">91</p> <p>1 that.</p> <p>2 Q. What about any experience with chemical</p> <p>3 toxins?</p> <p>4 A. You're referring to xenobiotics.</p> <p>5 Q. Sure. That would be an example.</p> <p>6 A. Pollutants, pollutants and ways to boost</p> <p>7 the immune system, but they would be primarily</p> <p>8 with products that would enhance the natural</p> <p>9 immunity of the body.</p> <p>10 Q. Okay.</p> <p>11 A. So in that respect, yes.</p> <p>12 Q. And where did you do that work?</p> <p>13 A. Well, those products would be at GNC.</p> <p>14 Q. Okay.</p> <p>15 A. That -- we did a line of product called</p> <p>16 cell support, and they were essentially</p> <p>17 antioxidant products that were developed.</p> <p>18 Q. And then what about do you have any</p> <p>19 experience in developing or formulating</p> <p>20 pharmaceutical products intended to inhibit</p> <p>21 infection caused by fungal spores?</p> <p>22 A. No.</p> <p>23 Q. Okay.</p> <p>24 MS. PETERSON: We've been going about an</p> <p>25 hour. Do you want to take a short break at this</p>
<p style="text-align: right;">90</p> <p>1 salespeople regarding the product.</p> <p>2 Q. Okay. And is it correct that you do not</p> <p>3 have any experience in developing or formulating</p> <p>4 pharmaceutical products to prevent infection</p> <p>5 caused by anthrax?</p> <p>6 A. Yes.</p> <p>7 Q. Yes, meaning you do not have that</p> <p>8 experience?</p> <p>9 A. I do not have that experience, no.</p> <p>10 Q. You also don't have any experience in</p> <p>11 developing or formulating pharmaceutical products</p> <p>12 to prevent infection or to inhibit infection</p> <p>13 caused by coronavirus?</p> <p>14 A. I have no experience in that.</p> <p>15 Q. Any experience with smallpox?</p> <p>16 A. No experience in that.</p> <p>17 Q. What about influenza?</p> <p>18 A. Same, no experience in that.</p> <p>19 Q. What about avian flu?</p> <p>20 A. No experience in that.</p> <p>21 Q. Swine flu?</p> <p>22 A. No experience in swine flu.</p> <p>23 Q. Rhinovirus?</p> <p>24 A. Well, I've had rhinovirus. That's my</p> <p>25 only experience, but no, not in the development of</p>	<p style="text-align: right;">92</p> <p>1 point?</p> <p>2 MR. KREMEN: When do you want to -- do</p> <p>3 you want to break for lunch at any point?</p> <p>4 MS. PETERSON: Let's go off the record.</p> <p>5 THE VIDEOGRAPHER: We're going off the</p> <p>6 record. The time is now 12:05 p.m.</p> <p>7 (Recess from the record.)</p> <p>8 THE VIDEOGRAPHER: We're back on the</p> <p>9 record. The time is now 12:48 p.m.</p> <p>10 BY MS. PETERSON:</p> <p>11 Q. Dr. Lemmo, did you have any</p> <p>12 conversations with anyone on either of the breaks</p> <p>13 that we've taken today about the substance of your</p> <p>14 testimony that you've given?</p> <p>15 A. No, I have not.</p> <p>16 Q. Now, Dr. Lemmo, we touched on this</p> <p>17 briefly, but you have provided opinions on what</p> <p>18 you consider to be the appropriate level of skill</p> <p>19 of a person of ordinary skill in the art in this</p> <p>20 matter; right?</p> <p>21 A. Correct.</p> <p>22 Q. And what do you consider to be the field</p> <p>23 of the invention of the '802 patent?</p> <p>24 A. Well, I see it really two ways. I see</p> <p>25 it essentially as a medical device, but as an</p>

October 24, 2022

<p>93</p> <p>1 application which could be considered like a</p> <p>2 cosmetic. But I do see it as a medical device.</p> <p>3 Q. And you understand that the claims are</p> <p>4 directed to a formulation?</p> <p>5 A. Yes, that's correct. But the method of</p> <p>6 delivering the formulation relates more in my</p> <p>7 opinion to a medical device.</p> <p>8 Q. And how is the formulation to be</p> <p>9 delivered?</p> <p>10 A. Well, as a medical device, since it's</p> <p>11 applied to the skin and not in the nose, per se,</p> <p>12 taken internally, I see it really as being</p> <p>13 something that you're using that's applied to the</p> <p>14 skin in the nasal passage area and possibly a</p> <p>15 small distance into the nose, but not necessarily</p> <p>16 something that is considered typically as a</p> <p>17 pharmaceutical agent that you would be either</p> <p>18 ingesting or somehow becoming more invasive.</p> <p>19 Q. So would you consider all pharmaceutical</p> <p>20 products that are administered to the skin to be</p> <p>21 devices?</p> <p>22 A. No. Some of them are topical agents</p> <p>23 that are specific for the treatment of skin</p> <p>24 conditions.</p> <p>25 Q. And topical -- drugs that are delivered</p>	<p>95</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. But the object of the invention is not</p> <p>3 to moisturize the skin; is it?</p> <p>4 A. No, it's not.</p> <p>5 Q. The object of the invention is to</p> <p>6 inhibit infection by microorganisms in an</p> <p>7 individual?</p> <p>8 A. I think it's to inhibit particle flow</p> <p>9 into the respiratory system. It doesn't restrict</p> <p>10 itself to microorganisms.</p> <p>11 Q. Sure.</p> <p>12 So microorganisms, though, are</p> <p>13 encompassed by the claims; correct?</p> <p>14 A. Yes, anything that would be in the</p> <p>15 airflow stream that would be entering the</p> <p>16 respiratory system, according to the way I read</p> <p>17 it, would be included in that, yes.</p> <p>18 Q. So that would include microorganisms;</p> <p>19 right?</p> <p>20 A. Pollen, microorganisms, bacteria,</p> <p>21 viruses, animal dander, a number of items that</p> <p>22 potentially are in the airstream. There could be</p> <p>23 even pollutants, as I mentioned before, with the</p> <p>24 xenobiotics, chemical entity, smoke can all be in</p> <p>25 your airstream, depending on your environment.</p>
<p>94</p> <p>1 topically can also be used for systemic treatment,</p> <p>2 as well; right?</p> <p>3 A. Yes, that's correct. Both in humans as</p> <p>4 well as in animals.</p> <p>5 Q. And the formulation that's described in</p> <p>6 the '802 patent, it doesn't require any special</p> <p>7 device for a person to apply it to their skin</p> <p>8 around the nasal passages; correct?</p> <p>9 A. That's correct. You could apply it with</p> <p>10 your finger.</p> <p>11 Q. So if it's a gel or a cream, it would</p> <p>12 just be applied directly?</p> <p>13 A. That's correct.</p> <p>14 Q. And you also mentioned that it was</p> <p>15 similar to a cosmetic, but you understand that the</p> <p>16 claims also require, I guess what we would call,</p> <p>17 active ingredients to prevent or inhibit</p> <p>18 infection; correct?</p> <p>19 MR. KREMEN: Objection to the form of</p> <p>20 the question.</p> <p>21 THE WITNESS: The composition contains</p> <p>22 ingredients that are moisturizing to the skin.</p> <p>23 They may be emollients there that are moisturizing</p> <p>24 to the skin, and that's why I would consider that</p> <p>25 composition similar to a cosmetic.</p>	<p>96</p> <p>1 Q. And cosmetics aren't typically used to</p> <p>2 treat or inhibit infection caused by</p> <p>3 microorganisms or bacteria or viruses; correct?</p> <p>4 A. Cosmetics are -- can you just repeat</p> <p>5 that? You said are --</p> <p>6 Q. Cosmetic products are not typically used</p> <p>7 to treat or inhibit infection caused by</p> <p>8 microorganisms such as bacteria or viruses that</p> <p>9 enter the respiratory system?</p> <p>10 A. Yes. Yes, I would consider cosmetics to</p> <p>11 be, as their name implies, either something that</p> <p>12 you're applying to the skin to improve the</p> <p>13 appearance or the condition of the skin.</p> <p>14 Essentially it's different.</p> <p>15 Q. Okay. Now, I -- okay. So going back to</p> <p>16 your opinions on what you believe to be the person</p> <p>17 of ordinary skill in the art, has your opinion</p> <p>18 changed since you provided it in your reports?</p> <p>19 A. Based upon what I've read, as far as its</p> <p>20 definition, and since I'm not legally trained on</p> <p>21 how it's used legally, I have to base my opinion</p> <p>22 on what I read. But I have not changed my opinion</p> <p>23 on what you consider to be a person of ordinary</p> <p>24 skill in the art.</p> <p>25 Q. Okay. No, I just want to understand if</p>

October 24, 2022

<p style="text-align: right;">97</p> <p>1 your opinion is still the same as how it's</p> <p>2 explained in your reports?</p> <p>3 A. Absolutely, I understand that. Yes,</p> <p>4 it's the same.</p> <p>5 Q. Okay. And you said that your opinion</p> <p>6 was based on what you read. What materials did</p> <p>7 you read that informed your opinion?</p> <p>8 A. Well, essentially, I went online to see</p> <p>9 what the definition is from a patent standpoint.</p> <p>10 There are references to both a person of ordinary</p> <p>11 skill, as well as a person of extraordinary skill.</p> <p>12 So I tried to educate myself before I wrote</p> <p>13 anything regarding an opinion on what I've read.</p> <p>14 Q. Okay. And do you -- I don't think those</p> <p>15 online definitions were cited in your report. Do</p> <p>16 you recall what references or materials you viewed</p> <p>17 online to obtain this information?</p> <p>18 A. Yeah, quite honestly, at this point I</p> <p>19 don't remember when I did that.</p> <p>20 Q. Okay. And you understand that Dr. Amiji</p> <p>21 has offered a differing opinion of the level of</p> <p>22 skill?</p> <p>23 A. Yes, I read his reports, and I do</p> <p>24 respect his -- you know, his experience and his</p> <p>25 comments, but I differ.</p>	<p style="text-align: right;">99</p> <p>1 the Matrixx matter and in this matter.</p> <p>2 Did I understand that correctly?</p> <p>3 A. Yes, that's correct.</p> <p>4 Q. Okay. I just want to make sure I didn't</p> <p>5 miss anything. You did not provide any opinions</p> <p>6 in this matter directed to infringement using</p> <p>7 Dr. Amiji's standard of a person of ordinary skill</p> <p>8 in the art?</p> <p>9 MR. KREMEN: Objection to the form of</p> <p>10 the question.</p> <p>11 BY MS. PETERSON:</p> <p>12 Q. Let me rephrase.</p> <p>13 So your opinions that you provided in</p> <p>14 this matter as reflected in your expert reports</p> <p>15 and in your declaration, you applied your</p> <p>16 understanding of the level of a person of ordinary</p> <p>17 skill in the art; correct?</p> <p>18 A. That's correct.</p> <p>19 Q. Did you provide any alternative or</p> <p>20 different opinions on those same issues but</p> <p>21 instead using Dr. Amiji's definition?</p> <p>22 MR. KREMEN: Objection to the form of</p> <p>23 the question.</p> <p>24 THE WITNESS: No.</p> <p>25</p>
<p style="text-align: right;">98</p> <p>1 Q. Yeah, I understand.</p> <p>2 Do you consider yourself to be a person</p> <p>3 of ordinary skill in the art directed to the '802</p> <p>4 patent under your definition?</p> <p>5 A. Considering everything that I've read</p> <p>6 over time, I would have to exclude myself as a</p> <p>7 person of ordinary skill and more towards the</p> <p>8 person of extraordinary skill, since I've spent a</p> <p>9 good deal of time, not only in this particular</p> <p>10 case but in the previous case with Matrixx, trying</p> <p>11 to understand and grasp the concept.</p> <p>12 Q. So that would be based on your research</p> <p>13 and the work that you did in forming your opinions</p> <p>14 in both the Matrixx litigation matter as well this</p> <p>15 present litigation matter?</p> <p>16 A. Yes, and I --</p> <p>17 MR. KREMEN: Objection to the form of</p> <p>18 the question.</p> <p>19 THE WITNESS: You might want to repeat</p> <p>20 that question as far as I got into -- there was an</p> <p>21 interference, I'm sorry.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. I think you said it was -- your prior</p> <p>24 comment that it was based on the research and the</p> <p>25 work that you've done in forming your opinions in</p>	<p style="text-align: right;">100</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Okay. Let's pull up your responsive</p> <p>3 report.</p> <p>4 MS. PETERSON: This is Exhibit 14. And</p> <p>5 we'll go to page 2 of the report.</p> <p>6 And could we go down one page.</p> <p>7 BY MS. PETERSON:</p> <p>8 Q. Okay. So you see here on this page we</p> <p>9 have your section titled "A Person Having Ordinary</p> <p>10 Skill In The Art"; correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Looking at the last full sentence</p> <p>13 on this page, you state that the person --</p> <p>14 actually, the POSITA -- could we use that phrase?</p> <p>15 Is that okay?</p> <p>16 A. Yes, that's fine.</p> <p>17 Q. Okay. So at the bottom of page 2, you</p> <p>18 state that the POSITA "is a person who does not</p> <p>19 possess special or distinct knowledge or</p> <p>20 capability in a discipline"; correct?</p> <p>21 A. That's correct.</p> <p>22 Q. And then going on, you explain, "This</p> <p>23 person would have a basic skill set or talent</p> <p>24 related to the technology related to the art";</p> <p>25 right?</p>

October 24, 2022

<p>101</p> <p>1 A. Yes, that's correct.</p> <p>2 Q. And so, in your opinion, it would be a</p> <p>3 technician?</p> <p>4 A. A technician would qualify, yes.</p> <p>5 Q. Okay. And I think if we look maybe four</p> <p>6 sentences down or so on the page, you say, "A</p> <p>7 PHOSITA is primarily a technician in his chosen</p> <p>8 field"--</p> <p>9 A. Yes.</p> <p>10 Q. -- "and his skills are those ordinarily</p> <p>11 associated with such a technician"; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay.</p> <p>14 MS. PETERSON: If we could scroll down a</p> <p>15 little bit more to the bottom of this page.</p> <p>16 BY MS. PETERSON:</p> <p>17 Q. The last paragraph, it looks like you're</p> <p>18 drawing on your experience as a college professor.</p> <p>19 And it looks like teaching both students who are</p> <p>20 non-majors as well as students who are majoring in</p> <p>21 that particular discipline; correct?</p> <p>22 A. That's correct.</p> <p>23 Q. And is it your opinion that the POSITA</p> <p>24 for the '802 patent would be someone who took</p> <p>25 general courses in the relevant subject matter but</p>	<p>103</p> <p>1 their level of-- their level of sophistication or</p> <p>2 level of education that they need in order to</p> <p>3 carry out that function.</p> <p>4 Q. Okay. Did Mr. Kremen or any other</p> <p>5 counsel for Trutek provide you with any</p> <p>6 explanation or framework for how to determine the</p> <p>7 level of skill for a POSITA as it relates to the</p> <p>8 '802 patent?</p> <p>9 A. I've had discussion with Mr. Kremen</p> <p>10 regarding the person of ordinary skill from the</p> <p>11 legal standpoint just to see if, in fact, in</p> <p>12 reviewing the material, you know, if I was on the</p> <p>13 right track, I was explaining it correctly.</p> <p>14 Q. Okay. And the -- those legal stand --</p> <p>15 let me start over.</p> <p>16 The legal framework or guidelines or</p> <p>17 framework that Mr. Kremen provided to you, you</p> <p>18 don't have that explained or set out in your</p> <p>19 report; correct?</p> <p>20 A. That's correct.</p> <p>21 Q. Okay. Now, in the laboratory setting,</p> <p>22 what is your understanding of the difference</p> <p>23 between a technician and, say, you know, someone</p> <p>24 with more experience who's running the lab or</p> <p>25 supervising the research?</p>
<p>102</p> <p>1 did not major or focus on that field at any level?</p> <p>2 A. That's correct.</p> <p>3 Q. So all of this discussion that we just</p> <p>4 went through right now, that would be your general</p> <p>5 understanding of what a person of ordinary skill</p> <p>6 in the art should be?</p> <p>7 MR. KREMEN: Objection to form.</p> <p>8 THE WITNESS: The -- could you just</p> <p>9 repeat that question for me, I'm sorry?</p> <p>10 BY MS. PETERSON:</p> <p>11 Q. Yeah.</p> <p>12 So all of those statements that we just</p> <p>13 went through, those reflect your general</p> <p>14 understanding of what a person of ordinary skill</p> <p>15 in the art should be?</p> <p>16 A. Yes, the qualifications that I would</p> <p>17 consider.</p> <p>18 Q. Okay. And the basis for that</p> <p>19 understanding is in part based on what you</p> <p>20 reviewed online about the standard?</p> <p>21 A. My readings and I think from my</p> <p>22 experience in product development as far as the</p> <p>23 basic concepts that are employed by in getting a</p> <p>24 product from concept to finished product, the</p> <p>25 people who would be involved in that process and</p>	<p>104</p> <p>1 MR. KREMEN: Objection to the form of</p> <p>2 the question.</p> <p>3 THE WITNESS: You might have to rephrase</p> <p>4 that for me.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. Well, you've said that you think the</p> <p>7 appropriate level of skill is that of a</p> <p>8 technician, and so I just want to understand, you</p> <p>9 know, what is a technician? Like what are their</p> <p>10 basic qualifications, especially relative to other</p> <p>11 people with more experience?</p> <p>12 A. Okay. Based on my professional</p> <p>13 experience in the corporate setting, the</p> <p>14 laboratory was headed or directed by a person who</p> <p>15 would be a Ph.D. level scientist. That person</p> <p>16 would be my peer as a Ph.D. scientist who is in</p> <p>17 charge of the development product -- the</p> <p>18 development of products. But carrying out</p> <p>19 responsibility of getting the concept to the steps</p> <p>20 necessary to either quantify or quality of the</p> <p>21 materials used in the product would be individuals</p> <p>22 who would be at a lower level.</p> <p>23 On the manufacturing side, the person</p> <p>24 who would be formulating the product, making the</p> <p>25 physical product from the concept that I designed,</p>

October 24, 2022

<p style="text-align: right;">105</p> <p>1 developed, created, whatever terminology you wish</p> <p>2 to use, that individual may not have an advanced</p> <p>3 degree but has the experience or capacity to carry</p> <p>4 it out from the concept that I explain to the</p> <p>5 finished product that the consumer would receive.</p> <p>6 Q. Okay. So the technician then that</p> <p>7 you're referring to, that would be someone who on</p> <p>8 the manufacturing side has the experience</p> <p>9 necessary to carry out the instructions for how to</p> <p>10 make the product, how to formulate the product;</p> <p>11 right?</p> <p>12 A. Yes. For example, if a product has to</p> <p>13 be produced in a specific dosage form -- tablet,</p> <p>14 capsule, liquid, whatever -- and there is</p> <p>15 equipment involved, that technician would know</p> <p>16 about binder, fillers, other agents that might be</p> <p>17 necessary to get the concept of the active</p> <p>18 ingredient that I want to create in this product</p> <p>19 into a form that maintains its stability and in a</p> <p>20 form that will be easy and understandable by the</p> <p>21 end user.</p> <p>22 Q. And so the technician would then</p> <p>23 primarily be someone who is following directions</p> <p>24 provided by the more experienced supervisor?</p> <p>25 A. Yes, or from me, as far as the</p>	<p style="text-align: right;">107</p> <p>1 MR. KREMEN: Objection to form.</p> <p>2 THE WITNESS: The way I understand that,</p> <p>3 for what you're asking me, is that a person who's</p> <p>4 carrying out an experiment could carry out that</p> <p>5 experiment once they've had the experience as a</p> <p>6 reason -- not necessarily formal education</p> <p>7 experience. I could go back to also my statement</p> <p>8 regarding the student.</p> <p>9 In my experience in teaching students</p> <p>10 laboratory procedure, the students should be able</p> <p>11 to, after the instruction was given by me, carry</p> <p>12 out those laboratory experiments, even though that</p> <p>13 student may not even have a degree.</p> <p>14 BY MS. PETERSON:</p> <p>15 Q. Okay. So as long as the required</p> <p>16 instruction is provided to the student or the</p> <p>17 technician, they should be able to carry out that</p> <p>18 experimentation?</p> <p>19 MR. KREMEN: Objection to form.</p> <p>20 THE WITNESS: They should recognize</p> <p>21 certain elements of what would be necessary to</p> <p>22 carry out the procedure.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. Would a technician or a non-major</p> <p>25 student typically be expected to design their own</p>
<p style="text-align: right;">106</p> <p>1 appearance of the product that I'm looking to</p> <p>2 create, whatever the case may be. Or that person</p> <p>3 might, in fact, as you say, go to a supervisor and</p> <p>4 get advice from that individual from a more</p> <p>5 technical standpoint, yes.</p> <p>6 Q. Would a technician typically be</p> <p>7 designing their own experiments, or would they be</p> <p>8 looking to the supervisor for input on that type</p> <p>9 of work?</p> <p>10 A. I think you've got two things working</p> <p>11 here. The technician could carry out the</p> <p>12 experimentation because it's almost like a</p> <p>13 cookbook for the experimentation. It doesn't</p> <p>14 really require a person -- if you've been doing</p> <p>15 this, you pretty much know how to do it from that</p> <p>16 standpoint. From the manufacturing standpoint, I</p> <p>17 think it's also the technician who could carry it</p> <p>18 out to get it through that process so that you</p> <p>19 have uniformity at the end.</p> <p>20 Q. Okay. So on the experimentation piece</p> <p>21 then, the technician is able to conduct the</p> <p>22 experiment because he or she either knows what</p> <p>23 experiment to conduct and they've done it before</p> <p>24 or they're provided instructions that they're able</p> <p>25 to follow; is that right?</p>	<p style="text-align: right;">108</p> <p>1 experiment to test a particular feature of a</p> <p>2 product if they haven't been given instructions or</p> <p>3 haven't had the experience in testing for that</p> <p>4 feature?</p> <p>5 A. I could only address my own experience</p> <p>6 in that capacity. When I was a college student,</p> <p>7 one of the courses that I had to take was design</p> <p>8 of experiment. And so without an advanced degree,</p> <p>9 I essentially had to design an experiment. And of</p> <p>10 course it was presented to the professor to see</p> <p>11 whether or not I did it correctly. But the answer</p> <p>12 is yes, you can definitely design experiments.</p> <p>13 You can do things or carry out procedures</p> <p>14 accordingly, even though the person may not have</p> <p>15 an advanced degree.</p> <p>16 And just as a follow-up to that, in</p> <p>17 reading some of the comments by Dr. Amiji on a</p> <p>18 person of ordinary skill, he does comment in a</p> <p>19 similar way to me in his report on invalidity, and</p> <p>20 he clearly stated that a person of ordinary skill</p> <p>21 in the art would know about things like viscosity</p> <p>22 and relative to the term of "adequate</p> <p>23 impermeability."</p> <p>24 So I think there's definitely somewhat</p> <p>25 of an understanding here. You know, this term --</p>

October 24, 2022

<p style="text-align: right;">109</p> <p>1 this term is something that needs to be 2 interpreted so we can have some agreements 3 regarding that. And I would refer you essentially 4 to his report on invalidity. I think it was 5 page 51, as I remember, because I remember reading 6 that. 7 Q. Okay. Would a student taking a certain 8 course outside of his or her major typically be 9 expected to be familiar with scientific literature 10 in that field outside of what is taught in the 11 course? 12 A. That's really subject to the professor 13 whether -- in my courses, for example, I always 14 provided students with opportunity to visit the 15 library and do independent study, whether they 16 were majors or not. So, you know, I feel that 17 that's part of the learning process to learn on 18 your own as opposed to just reiterating what the 19 professor has taught. It creates for you an 20 independent thinker. 21 Q. And going back to the laboratory or the 22 manufacturing setting, if a technician were to run 23 into a problem or an issue in carrying out the 24 concept or the instructions, would they typically 25 look to that more experienced supervisor for</p>	<p style="text-align: right;">111</p> <p>1 knowledge and understanding of the prior art would 2 not necessarily inform the POSA about how to make 3 and use the claimed invention; right? 4 MR. KREMEN: Objection to the form of 5 the question. If you understand it. 6 THE WITNESS: I don't understand the 7 question. You might want to clarify that for me. 8 BY MS. PETERSON: 9 Q. So we have, you know, a claimed 10 invention described in a patent and it's new, it's 11 not described in the prior art. So just having 12 knowledge of the prior art would not necessarily 13 inform the person of skill about how to make and 14 use the claimed invention; right? 15 MR. KREMEN: Objection to form. 16 THE WITNESS: I think it's a matter of 17 the terminology that's used. 18 BY MS. PETERSON: 19 Q. Well, I guess another way to look at it 20 is if the instructions or explanation for how to 21 make and use the claimed invention are not in the 22 prior art, then they would have to be provided 23 directly in the patent; correct? 24 A. I think that's a matter of patent law. 25 So I would agree. But that should not preclude</p>
<p style="text-align: right;">110</p> <p>1 advice or guidance on how to address the issue? 2 A. I would encourage that. If the 3 technician comes back to me, for example, with 4 choices of a component that I would like to use in 5 the product and suggests to me that this would 6 work better but it's in the same category, I would 7 give that person the opportunity to go ahead and 8 do that, go forward and use that as a substitute. 9 And I've done that in my experience. 10 Q. Okay. I think my question was a little 11 bit different, directed to a circumstance where a 12 technician runs into a problem, like the 13 instructions that were provided aren't working. 14 What would the technician do next? Would they go 15 to the supervisor for -- 16 A. Yes. 17 Q. -- input on how to correct that problem? 18 A. Yes, I would expect them to. 19 Q. Now, I think you also explained that it 20 is your understanding that the POSA also knows of 21 and understands all of the prior art in his field 22 of endeavor; correct? 23 A. Yes. 24 Q. Okay. So if a claimed invention is new 25 and not described in the prior art, then that</p>	<p style="text-align: right;">112</p> <p>1 the person from learning from reading the patent, 2 even though it's novel. 3 Q. No, understood. Absolutely, you can 4 read and -- I agree with you. 5 A. Yes. 6 Q. You can read and understand what is 7 explained in the patent. 8 A. Yes. 9 Q. Okay. Is it also your opinion that the 10 person of ordinary skill in the art must 11 necessarily be able to make and use the claimed 12 invention? 13 A. Again, I'm not clear on making and using 14 the claimed invention. Maybe can you just give me 15 a clarification on that again, I'm sorry? 16 Q. Sure. Give me one second because I 17 think this is -- 18 A. Sure. 19 Q. -- mostly a direct quote from your 20 report. 21 A. Sure. Yeah, if you identify where it 22 is, I can read the statement again. This way I'm 23 clearer. 24 Q. Okay. Let's take a look at -- oh, we're 25 on the right page, page 3.</p>

October 24, 2022

<p>1 MS. PETERSON: Can we scroll up to the</p> <p>2 top?</p> <p>3 BY MS. PETERSON:</p> <p>4 Q. The second full sentence, you state, "He</p> <p>5 must have sufficient experience in his art so as</p> <p>6 to become competent and understand and interpret</p> <p>7 the prior art related to a patent so that he can</p> <p>8 make and use the invention described and claimed</p> <p>9 in the patent."</p> <p>10 A. Yes.</p> <p>11 Q. So that's your opinion?</p> <p>12 A. Yes, it is.</p> <p>13 Q. Okay.</p> <p>14 A. Yeah. Yeah, I wasn't sure what you were</p> <p>15 referring to. Thank you for identifying it.</p> <p>16 Q. I was paraphrasing. I should have</p> <p>17 pointed directly to the report, I apologize.</p> <p>18 A. Not a -- no need to.</p> <p>19 Q. But just to understand, so it is your</p> <p>20 opinion that a person of skill in the art will</p> <p>21 necessarily be able to make and use the claimed</p> <p>22 invention as described in the patent?</p> <p>23 A. Yes.</p> <p>24 Q. Now, all of this is in contrast, I</p> <p>25 think, to what you described as an extraordinary</p>	<p>113</p> <p>1 providing your explanation as to the specific</p> <p>2 level of skill possessed by a person of ordinary</p> <p>3 skill in the art for the '802 patent; correct?</p> <p>4 A. Yes, that's correct.</p> <p>5 Q. And so specifically, it would be the</p> <p>6 level of skill of that of a chemical or a</p> <p>7 pharmaceutical formulator?</p> <p>8 A. Yes. And as I said previously, it could</p> <p>9 be an individual who is not classified in that</p> <p>10 terminology or in that manner but could be an</p> <p>11 individual who, again, has read extensively on the</p> <p>12 subject matter.</p> <p>13 Q. Okay. And then you set out two</p> <p>14 qualifications for the person of ordinary skill in</p> <p>15 the art; correct?</p> <p>16 A. Yes, I have two related but separate</p> <p>17 qualifications, yes.</p> <p>18 Q. Okay. And the first qualification, is</p> <p>19 that after reading the '802 patent, he should be</p> <p>20 able to create the formulations described in the</p> <p>21 patent; right?</p> <p>22 A. Yes, that's stated.</p> <p>23 Q. And then the second qualification is</p> <p>24 that the person of skill in the art must be</p> <p>25 positioned in time just prior to the effective</p>
<p>114</p> <p>1 skilled person?</p> <p>2 A. Yes.</p> <p>3 Q. And that would be someone who has an</p> <p>4 advanced degree?</p> <p>5 A. Yes, and I think who qualifies as a</p> <p>6 person of advanced skill in the area. There are</p> <p>7 many individuals who I respect and read their</p> <p>8 scientific views on things, and those are the</p> <p>9 people that I consider to be extraordinary.</p> <p>10 Q. Okay. And that extraordinarily skilled</p> <p>11 person could also be a student who is majoring in</p> <p>12 that particular subject matter?</p> <p>13 A. Yes, I think that a person who is</p> <p>14 extraordinary in their skill has some fundamental</p> <p>15 knowledge of concepts. In this particular case,</p> <p>16 some of these concepts are essentially taught to</p> <p>17 us in a high school setting or in an undergraduate</p> <p>18 setting. And then based on those skills or that</p> <p>19 knowledge, that person can proceed to reach an</p> <p>20 advanced degree but always hold on to those basic</p> <p>21 skills.</p> <p>22 Q. Okay. Let's move forward two pages to</p> <p>23 page 5.</p> <p>24 A. Okay.</p> <p>25 Q. And I think here on page 5, now you're</p>	<p>115</p> <p>1 filing date of the '802 patent; right?</p> <p>2 A. Yes.</p> <p>3 Q. So that's referring to the time period</p> <p>4 that we're looking at as opposed to any particular</p> <p>5 qualifications of the person of ordinary skill in</p> <p>6 the art?</p> <p>7 A. Yes.</p> <p>8 Q. Okay.</p> <p>9 A. And my thought -- you know, that's just</p> <p>10 a reflection of my thought process at the time.</p> <p>11 So at the time we have to go back to that year, or</p> <p>12 whatever year we're looking at, what was the level</p> <p>13 of knowledge within the scientific community</p> <p>14 related to the subject.</p> <p>15 Q. Okay. And then you provide some</p> <p>16 additional explanation on this same page</p> <p>17 indicating that the person of ordinary skill in</p> <p>18 the art would have the skill and experience to</p> <p>19 duplicate the formulations listed in the '802</p> <p>20 patent; right?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And then looking on the next</p> <p>23 page?</p> <p>24 A. Page 6?</p> <p>25 Q. Yep.</p>

October 24, 2022

<p>117</p> <p>1 A. Yes.</p> <p>2 Q. The very last sentence, you explain, I</p> <p>3 think what you identified, as your key requirement</p> <p>4 for the person of ordinary skill in the art; is</p> <p>5 that right?</p> <p>6 A. Yes.</p> <p>7 Q. And that would be the required</p> <p>8 experience --</p> <p>9 MR. KREMEN: Where are we?</p> <p>10 THE WITNESS: Page 6. Page 6, first</p> <p>11 paragraph.</p> <p>12 MS. PETERSON: There you go.</p> <p>13 BY MS. PETERSON:</p> <p>14 Q. Okay. So the key requirement, in your</p> <p>15 opinion, is that the person of ordinary skill in</p> <p>16 the art is -- has acquired experience -- or it is</p> <p>17 the acquired experience necessary to create a wide</p> <p>18 variety of formulations from the class of</p> <p>19 ingredients disclosed in the '802 patent; right?</p> <p>20 A. Yes, that's what I described earlier,</p> <p>21 where if there are options that as stated, if you</p> <p>22 remember our previous conversation relative to the</p> <p>23 '802 patent with the various tables of</p> <p>24 ingredients, but they identify categories, and so</p> <p>25 that person of ordinary skill in the art would be</p>	<p>119</p> <p>1 Okay. So looking at Claim 1, it starts</p> <p>2 out with what we call a preamble. That would be</p> <p>3 the opening phrase.</p> <p>4 Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. And it refers to "A method for</p> <p>7 electrostatically inhibiting harmful particulate</p> <p>8 matter from infecting an individual through nasal</p> <p>9 inhalation wherein a formulation is applied to</p> <p>10 skin or tissue of nasal passages of the individual</p> <p>11 in a thin film"; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. And then following that there are</p> <p>14 three other claim elements, A, B, and C; right?</p> <p>15 A. Yes.</p> <p>16 Q. And I think those are what you refer to</p> <p>17 respectively as capturing, holding, and killing;</p> <p>18 is that right?</p> <p>19 A. Yes, it's a -- forgive me for doing</p> <p>20 that, but it's how I try to convey messages</p> <p>21 sometimes to an audience that may not be</p> <p>22 scientifically directed. So it's a habit.</p> <p>23 Q. Okay. And then looking at Claim 2,</p> <p>24 Claim 2 is very similar to Claim 1 except that it</p> <p>25 recites a formulation instead of a method; right?</p>
<p>118</p> <p>1 able to decipher or understand the various options</p> <p>2 that they have available to them as recited in the</p> <p>3 patent.</p> <p>4 Q. Okay.</p> <p>5 MS. PETERSON: We can pull that exhibit</p> <p>6 down.</p> <p>7 BY MS. PETERSON:</p> <p>8 Q. And let's go back and take a look at</p> <p>9 Exhibit 2. This is the '802 patent.</p> <p>10 A. I think I have a copy instead of an</p> <p>11 electronic copy here. It's easier for me to read.</p> <p>12 Q. Yep, that's fine.</p> <p>13 A. My eyesight in my advanced years is --</p> <p>14 it's easier to look at it here. I have it.</p> <p>15 Q. Okay. So you've reviewed the '802</p> <p>16 patent in its entirety; right?</p> <p>17 A. Yes.</p> <p>18 Q. The specification as well as all of the</p> <p>19 claims?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And let's take a look at Claim 1.</p> <p>22 MR. KREMEN: Can we do that on the</p> <p>23 screen?</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. So it will be page 6 of the PDF.</p>	<p>120</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. And in addition to those elements</p> <p>3 of Claim 1 that we just walked through, Claim 2</p> <p>4 also adds the express requirement that the</p> <p>5 formulation contains at least one cationic agent</p> <p>6 and at least one biocidal agent; right?</p> <p>7 A. That's correct.</p> <p>8 Q. And then if we look at Claims 6 and 7,</p> <p>9 which are at the bottom of the page, those are</p> <p>10 dependent claims where the cationic agent and the</p> <p>11 biocidal agent specifically are benzalkonium</p> <p>12 chloride; right?</p> <p>13 A. That's correct.</p> <p>14 Q. Or in the case of Claim 7, the biocidal</p> <p>15 agent can be benzalkonium chloride or Lysine HCL?</p> <p>16 A. Hydrochloride, correct.</p> <p>17 Q. Okay. Now, you understand that because</p> <p>18 these claims use the word "comprising" that the</p> <p>19 formulations can also include additional</p> <p>20 ingredients; right?</p> <p>21 A. Yes.</p> <p>22 Q. Okay.</p> <p>23 MR. KREMEN: Calls for a legal</p> <p>24 conclusion.</p> <p>25</p>

October 24, 2022

<p>121</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. And you would also agree that Claims 1</p> <p>3 and 2, they do not just recite a formulation</p> <p>4 having certain ingredients; right?</p> <p>5 MR. KREMEN: Objection to the form of</p> <p>6 the question.</p> <p>7 THE WITNESS: Well, Claim 1 is a method.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. Yeah, it's a method of using a</p> <p>10 formulation; right?</p> <p>11 A. Yes, you said Claim 1 and 2.</p> <p>12 Q. Okay. So -- but Claim 1 does refer to a</p> <p>13 method of using the formulation; right?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And you agree that Claims 1 and 2</p> <p>16 do not just recite a formulation having certain</p> <p>17 ingredients or a method of using a formulation</p> <p>18 having certain ingredients; right?</p> <p>19 MR. KREMEN: Objection to the form.</p> <p>20 THE WITNESS: Your question is a little</p> <p>21 bit confusing to me if you could restate it.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. Okay. Let's look at just Claim 2.</p> <p>24 Would you agree that Claim 2 does not</p> <p>25 just recite a formulation having certain</p>	<p>123</p> <p>1 A. That's correct.</p> <p>2 Q. It must be able to electrostatically</p> <p>3 inhibit harmful particulate matter from infecting</p> <p>4 an individual through nasal inhalation?</p> <p>5 A. That's correct.</p> <p>6 Q. And the formulation must also be applied</p> <p>7 to the skin or tissue of nasal passages in a thin</p> <p>8 film?</p> <p>9 A. Yes, that's correct.</p> <p>10 Q. And Claim 2 also requires that the thin</p> <p>11 film applied or formed upon application of the</p> <p>12 formulation must electrostatically attract</p> <p>13 particulate matter to the thin film?</p> <p>14 A. That's correct.</p> <p>15 Q. And the claims also require that the</p> <p>16 thin film must hold the particulate matter in</p> <p>17 place?</p> <p>18 A. Correct.</p> <p>19 Q. And the formulation must also provide</p> <p>20 adequate impermeability to the thin film?</p> <p>21 A. Correct.</p> <p>22 Q. Okay. So those are all functions that</p> <p>23 the claim requires the formulation to provide;</p> <p>24 right?</p> <p>25 A. Correct. Yes.</p>
<p>122</p> <p>1 categories of ingredients?</p> <p>2 MR. KREMEN: Objection to form.</p> <p>3 THE WITNESS: In Claim 2, if we look at</p> <p>4 that information, it's -- it doesn't really spell</p> <p>5 out exactly what you're saying, I think. I may be</p> <p>6 a little bit confused as far as how you're</p> <p>7 interpreting that claim.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. Okay. Well, it doesn't read a</p> <p>10 formulation containing a biocidal agent and a</p> <p>11 cationic agent period. There are other elements</p> <p>12 to the claim; right?</p> <p>13 A. Yes.</p> <p>14 Q. So the formulation that is described in</p> <p>15 Claim 2 also has another -- has a number of other</p> <p>16 elements or functions that the formulation will</p> <p>17 perform; right?</p> <p>18 A. Yes, and they're recited in the tables</p> <p>19 in the body of the patent.</p> <p>20 Q. The ingredients are recited in the</p> <p>21 tables?</p> <p>22 A. Yes, that's correct.</p> <p>23 Q. Okay. But looking at Claim 2, Claim 2</p> <p>24 recites specific functions that the formulation</p> <p>25 should be able to perform; right?</p>	<p>124</p> <p>1 Q. And those same functions are recited in</p> <p>2 Claim 1, as well; right?</p> <p>3 A. That's correct.</p> <p>4 Q. Okay. Now, I think we all understand</p> <p>5 this, but is it your understanding that all</p> <p>6 cationic agents will have a positive charge?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. And the functions recited in the</p> <p>9 claims of electrostatically inhibiting and</p> <p>10 electrostatically attracting, those are the</p> <p>11 results of the positive charge of a cationic</p> <p>12 agent; right?</p> <p>13 MR. KREMEN: Objection to the form.</p> <p>14 THE WITNESS: Of the formulation.</p> <p>15 BY MS. PETERSON:</p> <p>16 Q. So it's the positive charge of the</p> <p>17 formulation?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. So you understand that even if a</p> <p>20 particular formulation includes a cationic agent</p> <p>21 with a positive charge, that other components or</p> <p>22 ingredients in the formulation could impact the</p> <p>23 overall charge of the formulation?</p> <p>24 MR. KREMEN: Objection to the form of</p> <p>25 the question.</p>

October 24, 2022

<p>1 THE WITNESS: You may want to clarify 2 that. 3 BY MS. PETERSON: 4 Q. So the formulation we're talking about 5 here, it doesn't just exist of only a cationic 6 agent; right? 7 A. That's correct. 8 Q. Okay. And you understand that other 9 ingredients in the formulation could impact the 10 overall charge of the formulation; right? 11 MR. KREMEN: Objection to form. 12 THE WITNESS: Other ingredients are in 13 the formula and may contribute cationic charge. 14 BY MS. PETERSON: 15 Q. And they could also make the charge 16 lower, as well; right? 17 A. If the ingredient is neutralizing the 18 cation. 19 Q. Okay. Yeah. So there could be 20 ingredients included in a formulation that could 21 neutralize the charge of the cationic agent 22 altogether; right? 23 A. It depends on the amount that's present 24 in the formula. 25 Q. Okay. And would you also agree that the</p>	<p>125 1 Q. Okay. The patent also describes a 2 number of biological or chemical elements, toxins, 3 and irritants, as well, that can be addressed by 4 the claimed invention; right? 5 A. Yes. Yes, that's correct. 6 Q. And the '802 patent also describes 7 preventing or inhibiting the infection of airborne 8 microorganisms? 9 A. I think the correct term here is 10 "inhibiting" them. 11 Q. Okay. So the '802 describes airborne -- 12 or the '802 patent describes airborne 13 microorganisms as another example of harmful 14 particulate matter that the claimed invention is 15 intended to inhibit the infection of; right? 16 A. If it's an infecting agent, yes. 17 Q. Also airborne fungal spores? 18 A. Any agent that would be in the airstream 19 at a concentration when a person is coming in 20 contact with it with a concentration of those 21 particles are irritants, negatively charged items, 22 they would all be classified as those that would 23 come in contact with the formulation and be 24 rendered, held onto as it states in Claim 1, 25 Section B. So that holding aspect is a very</p>
<p>126 1 pH of a formulation could impact the charge of the 2 formulation? 3 A. Yes. 4 Q. And the pH of the environment where the 5 formulation is applied could also impact the 6 surface charge; right? 7 A. Yes. 8 Q. Okay. So we also understand from 9 Claims 1 and 2 that the formulation is being used 10 in a manner to inhibit harmful particulate matter 11 from infecting an individual through nasal 12 inhalation; correct? 13 A. That's correct. 14 Q. And the '802 patent provides examples of 15 those harmful particulate matters; right? 16 A. That's correct. 17 Q. And it includes things like anthrax, 18 spores, various viruses like coronavirus, smallpox 19 virus, influenza, avian flu, swine flu, and 20 rhinovirus? 21 A. I would classify all of those as 22 negatively charged particles. 23 Q. Sure. But the patent describes a wide 24 variety of different viruses. 25 A. Yes.</p>	<p>127 1 important aspect of what's claimed here. 2 Q. Okay. And still looking at the types of 3 harmful particulate matters identified by the '802 4 patent, there's also a group of bacterial diseases 5 that are identified for which infection can be 6 inhibited; right? 7 A. Yes, absolutely. 8 Q. And that would include the bacteria that 9 are responsible for causing whooping cough, 10 meningitis, diphtheria, pneumonia, tuberculosis, 11 and anthrax? 12 A. Yeah, any of the bacteria that would 13 have a membrane structure that you've recited 14 would be affected by virtue of the cationic nature 15 of the formulation. 16 Q. Oh, okay. So, in other words, the -- 17 it's that membrane structure -- that membrane 18 structure would be disrupted by the cationic agent 19 or the biocidal agent? 20 A. That's correct. 21 Q. Okay. And as long as the harmful 22 particulate matter is negatively charged, then the 23 claimed invention will capture and hold those 24 harmful particulate matters, as well? 25 MR. KREMEN: Object to form.</p>

October 24, 2022

<p>129</p> <p>1 Which claim are you talking about, 1 or</p> <p>2 2?</p> <p>3 MS. PETERSON: Both.</p> <p>4 MR. KREMEN: Okay. You can answer.</p> <p>5 THE WITNESS: Yes, in 1, we're talking</p> <p>6 about attracting because of the charge difference</p> <p>7 and then holding it and essentially reaching that</p> <p>8 point of adequate impermeability where the product</p> <p>9 then -- or the bacteria, if that's what we're</p> <p>10 referring to -- becomes inactivated by means of</p> <p>11 the agents that are present. And that</p> <p>12 inactivation is essentially going to apply to</p> <p>13 those negatively charged particles that are in the</p> <p>14 airstream that could potentially create a problem</p> <p>15 for the individual.</p> <p>16 So it's just a matter of looking at it</p> <p>17 from a particulate matter standpoint. And that's</p> <p>18 why I used the expression earlier that I viewed it</p> <p>19 more as a medical device that happens to employ a</p> <p>20 formulation. If I've made myself clear.</p> <p>21 BY MS. PETERSON:</p> <p>22 Q. I'm not sure that that was clear, but</p> <p>23 that's okay. We can move on.</p> <p>24 A. Okay.</p> <p>25 Q. So benzalkonium chloride, you're</p>	<p>131</p> <p>1 decades; right?</p> <p>2 A. Oh, I believe since the 1930s from the</p> <p>3 literature that I've read on the subject, yes.</p> <p>4 Q. Okay. Let's take a look at Column 4 of</p> <p>5 the patent.</p> <p>6 MR. KREMEN: You have to scroll up.</p> <p>7 Keep going. One more.</p> <p>8 MS. PETERSON: Yeah, so down at the</p> <p>9 bottom of that page. If we can go all the way</p> <p>10 down to the bottom.</p> <p>11 BY MS. PETERSON:</p> <p>12 Q. Do you see at the very bottom, starting</p> <p>13 at line 65, the '802 patent describes a</p> <p>14 formulation of the invention comprises and then</p> <p>15 there's a list of ingredients, including water, at</p> <p>16 least one quarternary thickener --</p> <p>17 MS. PETERSON: And then if we scroll</p> <p>18 down --</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. -- a preservative, a conditioner, an</p> <p>21 emulsifier, a biocidal agent, and a neutralizing</p> <p>22 agent added to adjust and achieve a pH in the</p> <p>23 range of 5.0 to 6.8?</p> <p>24 Do you see that?</p> <p>25 A. Yes.</p>
<p>130</p> <p>1 familiar with that agent; right?</p> <p>2 A. Yes. Yes, I am.</p> <p>3 Q. And when you used as a biocide, it works</p> <p>4 by disrupting or breaking up the cell membrane of</p> <p>5 an organism; right?</p> <p>6 A. That's correct. That's correct.</p> <p>7 Q. So it won't have the same effect on</p> <p>8 something where the cell membrane isn't present or</p> <p>9 protected, like in a fungal spore or an anthrax</p> <p>10 spore; right?</p> <p>11 A. If there was a membrane --</p> <p>12 MR. KREMEN: Objection to form.</p> <p>13 THE WITNESS: If there was a membrane</p> <p>14 present, we're looking at what -- let me give you</p> <p>15 an example. If you're looking at enveloped</p> <p>16 viruses, there are some that have a membrane.</p> <p>17 Others do not. So what you're looking at is the</p> <p>18 effect -- and it's a chemical effect, essentially,</p> <p>19 of the action of the benzalkonium chloride on the</p> <p>20 membrane of the microorganism that we're</p> <p>21 questioning.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. Okay. And that biocidal activity of</p> <p>24 benzalkonium chloride, that's something that's</p> <p>25 been known and it's been used for that purpose for</p>	<p>132</p> <p>1 Q. So to function as described in the</p> <p>2 claims of the '802 patent, does the formulation</p> <p>3 need to have all of those ingredients?</p> <p>4 A. I believe they do. That it does, yes.</p> <p>5 Q. And then you mentioned this earlier, but</p> <p>6 the patent goes on and includes ten tables</p> <p>7 describing typical formulations; right?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And it's not a specific</p> <p>10 individual formulation disclosed in those tables,</p> <p>11 but rather a list of ingredients with ranges for</p> <p>12 the amounts of each ingredient; right?</p> <p>13 A. Yes.</p> <p>14 Q. So within each table, there can be some</p> <p>15 variation in terms of how much of each ingredient</p> <p>16 is used; right?</p> <p>17 A. Yes.</p> <p>18 Q. So would it be fair to say then that the</p> <p>19 patent lists more than just ten discrete</p> <p>20 formulations?</p> <p>21 A. Multiples. In the cases of each of the</p> <p>22 tables it can give you a variety of choices.</p> <p>23 Q. Yeah, because I think water is the</p> <p>24 primary ingredient in most of these, and it ranges</p> <p>25 anywhere from 52 to 88 percent; right?</p>

October 24, 2022

<p>133</p> <p>1 A. Yes. And it's an important component 2 for the other materials to function. 3 Q. Okay. And then these tables include 4 anywhere between 12 to 18 ingredients each; right? 5 A. I would safely -- I haven't counted 6 them, but I would safely say yes. I assume that 7 you did count it to give me that number. That's 8 fine. 9 Q. It's pretty specific. 10 Okay. And then I saw that a few of the 11 tables also list benzalkonium chloride? 12 A. Yes. 13 Q. And benzalkonium chloride is always 14 identified in the range of .25 to 1 percent. 15 A. Yes, I think that's related to the 16 standard that's allowable. 17 Q. Okay. So is that the effective 18 concentration of benzalkonium chloride that's 19 needed to function in the claimed invention? 20 A. I believe so. 21 Q. Okay. 22 A. Yes. 23 Q. Okay. 24 MS. PETERSON: We could take that down. 25 MR. KREMEN: It's now 1:47. Do you</p>	<p>135</p> <p>1 present itself as more of a problem than a benefit 2 associated with using that ingredient in the 3 formula. 4 Q. Okay. 5 A. So in any formulation, regardless if 6 it's nutritional or otherwise, we, in formulating 7 the product, have to consider what is the 8 tolerance level for ingredients and what would be 9 the benefit level to effect the outcome of the 10 formulation. 11 Q. Sure. 12 And so, likewise, varying the percentage 13 of the ingredients could also change the potency 14 or the efficacy of the formulation; right? 15 A. Absolutely. Absolutely. 16 Q. And varying the percentage of 17 ingredients could also change the consistency of 18 the formulation? 19 A. Yes, it could fall out of uniformity. 20 And that's why in many instance stability studies 21 are conducted on formulas when they are 22 conceptualized to the point where, as we were 23 speaking before, are brought into the laboratory 24 setting for the testing that's required to 25 demonstrate uniformity of dose and consistency of</p>
<p>134</p> <p>1 think we might want to have a break at this point? 2 MS. PETERSON: Yeah, sure, we can do 3 that. 4 MR. KREMEN: Ten minutes? 5 MS. PETERSON: Yep, that's good. 6 THE VIDEOGRAPHER: We're going off the 7 record. The time is 1:48 p.m. 8 (Recess from the record.) 9 THE VIDEOGRAPHER: We're back on the 10 record. The time is now 2 p.m. 11 BY MS. PETERSON: 12 Q. Okay. Dr. Lemmo, I actually had just 13 one other follow-up question about the 14 formulations listed in the '802 patent. 15 A. Sure. 16 Q. Would you agree that varying the 17 percentage of the ingredients listed in those 18 formulations can change the potency of the 19 formulation? 20 A. It depends on the ingredient, yes. So 21 that if, for example -- I don't see it in the -- 22 you know, I've have to scan it again. But if in 23 the case of benzalkonium chloride, if it's 24 exceeding that threshold limit, that could be very 25 irritating for the user and, therefore, that may</p>	<p>136</p> <p>1 ingredient and stability studies. That's all 2 something that would then be evaluated that the 3 formula does, in fact, do what you claim it's 4 going to do. 5 Q. And changing the ingredients or the 6 percentage of the ingredients could also have an 7 impact on the adhesive properties of the 8 formulation? 9 A. If it's one of the ingredients that is 10 associated with either adhesion or cohesion, the 11 answer is yes. 12 Q. Okay. 13 MS. PETERSON: Let's pull up Dr. Lemmo's 14 claim construction declaration, and we will mark 15 this as Exhibit 17. 16 (Lemmo Deposition Exhibit 17 was marked 17 for identification and attached to the 18 transcript.) 19 THE REMOTE TECHNICIAN: Stand by. 20 BY MS. PETERSON: 21 Q. Dr. Lemmo, do you recognize Exhibit 17 22 as a copy of your declaration in support of Trutek 23 Corporation's claim construction brief? 24 A. Yes, I do. 25 Q. Okay. And if we move to the last page.</p>

October 24, 2022

<p>137</p> <p>1 Is that your signature?</p> <p>2 A. Yes, that is. And it's dated</p> <p>3 September 24th, 2022.</p> <p>4 Q. Okay. And do you see up at the top of</p> <p>5 the page there's a header in blue that indicates</p> <p>6 it was filed on September 27th, 2022?</p> <p>7 A. Yes, I see that.</p> <p>8 Q. Okay. Now, I notice that you do not</p> <p>9 have a separate list of materials that you</p> <p>10 reviewed in connection with preparing this</p> <p>11 declaration; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Is everything that you considered or</p> <p>14 reviewed in forming the opinions expressed in the</p> <p>15 declaration mentioned directly in the declaration?</p> <p>16 A. Yes. I'd have to just review that</p> <p>17 document again as we go through it.</p> <p>18 Q. Okay. Well, as of right now, are you</p> <p>19 aware of anything else that you reviewed in</p> <p>20 connection with preparing this declaration that</p> <p>21 you didn't identify?</p> <p>22 A. No.</p> <p>23 Q. Okay. And of course you prepared this</p> <p>24 declaration in support of Trutek's claim</p> <p>25 construction positions in the litigation; right?</p>	<p>139</p> <p>1 MR. KREMEN: Yeah. Right.</p> <p>2 BY MS. PETERSON:</p> <p>3 Q. "Based on the disclosures," you see</p> <p>4 that?</p> <p>5 So, Dr. Lemmo, in this declaration</p> <p>6 you're expressing the opinion that the claim</p> <p>7 terms, "electrostatically inhibiting,"</p> <p>8 "electrostatically attracting," "adequate</p> <p>9 impermeability," and "renders said particulate</p> <p>10 matter harmless" are sufficiently clear and</p> <p>11 unambiguous; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay.</p> <p>14 MR. KREMEN: You're --</p> <p>15 THE WITNESS: Particularly to a person</p> <p>16 of ordinary skill in the art.</p> <p>17 BY MS. PETERSON:</p> <p>18 Q. Okay.</p> <p>19 A. And that's what I referred to earlier</p> <p>20 for this terminology relative to Dr. Amiji's</p> <p>21 report.</p> <p>22 Q. Okay. So that was the standard that you</p> <p>23 applied here, "sufficiently clear and unambiguous</p> <p>24 to a person of ordinary skill"?</p> <p>25 A. Yes, that's correct.</p>
<p>138</p> <p>1 A. Correct, yes.</p> <p>2 Q. Okay. Let's go back to page 2. And,</p> <p>3 actually, we're going to be -- actually, page 3.</p> <p>4 Let's go to the next page. This paragraph 5 --</p> <p>5 nope, one page earlier.</p> <p>6 MR. KREMEN: Liane, unfortunately, the</p> <p>7 page numbers are hard to read. So I guess if we</p> <p>8 could also identify the page by just the first</p> <p>9 sentence on the top, it would be helpful.</p> <p>10 MS. PETERSON: Yeah. And where there's</p> <p>11 a clear paragraph number, I identify it that way</p> <p>12 so that there's no ambiguity. It's just for</p> <p>13 Jennifer sometimes it's easier to go to the page</p> <p>14 of the PDF so we can move through the document</p> <p>15 quickly.</p> <p>16 BY MS. PETERSON:</p> <p>17 Q. But looking at this page, which I think</p> <p>18 is page 3, we have paragraph -- do you see</p> <p>19 paragraph 5C?</p> <p>20 A. It got cut off at the bottom.</p> <p>21 MR. KREMEN: It's 5C, though; right?</p> <p>22 Okay.</p> <p>23 MS. PETERSON: 5C.</p> <p>24 MR. KREMEN: E or --</p> <p>25 MS. PETERSON: C as in cat.</p>	<p>140</p> <p>1 Q. Okay. So let's move ahead to paragraph</p> <p>2 32, which is going to be page 13 of the PDF.</p> <p>3 MR. KREMEN: 32.</p> <p>4 THE WITNESS: Thank you for increasing</p> <p>5 the print size.</p> <p>6 MR. KREMEN: Yeah, that helps.</p> <p>7 THE WITNESS: It's very helpful.</p> <p>8 MR. KREMEN: That really helps.</p> <p>9 THE WITNESS: It's a lot of eyestrain.</p> <p>10 BY MS. PETERSON:</p> <p>11 Q. Okay. And here, Dr. Lemmo, you're</p> <p>12 referring to what you discuss as the "hold"</p> <p>13 function?</p> <p>14 A. Yes.</p> <p>15 Q. Of the claimed invention?</p> <p>16 A. Yes.</p> <p>17 Q. And you say that holding is based on the</p> <p>18 adhesive and cohesive properties of the</p> <p>19 formulation?</p> <p>20 A. Yes, that's correct.</p> <p>21 Q. Okay. And looking at the next</p> <p>22 paragraph, 33, where you're talking about</p> <p>23 adhesion, the very last sentence you state that,</p> <p>24 "This sets up a barrier of impermeability" --</p> <p>25 A. Correct.</p>

October 24, 2022

<p>1 Q. -- that -- "trapping a significant" --</p> <p>2 let me -- the entire sentence reads that, "This</p> <p>3 sets up a barrier of impermeability trapping a</p> <p>4 significant number of these particles outside the</p> <p>5 nasal passageway"; right?</p> <p>6 A. Correct.</p> <p>7 Q. Okay. So the claimed formulation, once</p> <p>8 applied, it creates a thin film on the surface of</p> <p>9 the skin; right?</p> <p>10 A. That's correct.</p> <p>11 Q. And that thin film, as recited in the</p> <p>12 claims, is impermeable, meaning that it creates a</p> <p>13 physical barrier?</p> <p>14 A. It -- yes, it creates a physical barrier</p> <p>15 outside of the body.</p> <p>16 Q. Okay. And then that physical barrier</p> <p>17 traps those harmful particles from being inhaled</p> <p>18 into the respiratory system; right?</p> <p>19 A. That's correct.</p> <p>20 Q. Okay. Let's move ahead two pages to</p> <p>21 paragraph 37.</p> <p>22 In paragraph 37, you conclude that the</p> <p>23 claim term "adequate impermeability is a property</p> <p>24 of the applied formulation that allows the harmful</p> <p>25 particles to be held in place for a sufficient</p>	<p>141</p> <p>1 believe it's four hours. You know, a lot happens</p> <p>2 within a four-hour window. So I believe that's</p> <p>3 what -- you know, what's -- but I'm not certain.</p> <p>4 You know, don't hold me to that one.</p> <p>5 Q. Is it possible you're thinking of</p> <p>6 marketing claims of the products that you looked</p> <p>7 at in the case?</p> <p>8 A. Thinking about it, it may not have been</p> <p>9 in the patent itself that I specifically saw that.</p> <p>10 It was probably on the website for the product.</p> <p>11 Q. Okay. So to the best of your knowledge,</p> <p>12 the patent doesn't define how much time is</p> <p>13 sufficient to hold the harmful particles in place</p> <p>14 to allow them to be inactivated; right?</p> <p>15 A. Yeah, at this point that's what I'm</p> <p>16 assuming, yes.</p> <p>17 Q. Okay. So, I mean, how much time is</p> <p>18 sufficient? Is an hour good enough?</p> <p>19 MR. KREMEN: Objection to form.</p> <p>20 THE WITNESS: It's very vague. That's a</p> <p>21 very vague question of how much time. Because as</p> <p>22 I said earlier, I use the product. I use the</p> <p>23 product primarily during times when I'm in the</p> <p>24 company of strangers, but in my own home where I</p> <p>25 am now speaking to you, I'm not using the product.</p>
<p>142</p> <p>1 time to be inactivated"; right?</p> <p>2 A. That's correct.</p> <p>3 Q. Okay. And so like we just talked about,</p> <p>4 that's a physical barrier that allows the harmful</p> <p>5 particles to be held in place --</p> <p>6 A. That's correct.</p> <p>7 Q. -- for a sufficient time? Okay.</p> <p>8 A. That's right.</p> <p>9 Q. Now, "sufficient time," that's another</p> <p>10 relative term; right?</p> <p>11 A. Yes. Again, we don't know when an</p> <p>12 individual will come in contact with a harmful</p> <p>13 microorganism that's in the airstream. So as I</p> <p>14 remember, the statements regarding the use of the</p> <p>15 product is to use the product for a specific</p> <p>16 period of time before a person may want to</p> <p>17 reapply.</p> <p>18 Q. And then what does the patent say about</p> <p>19 how much -- what does the '802 patent say about</p> <p>20 how much time is sufficient?</p> <p>21 A. I believe it was a four-hour window. I</p> <p>22 have to go back and check that to be exact.</p> <p>23 Q. So you think four hours is specified in</p> <p>24 the patent.</p> <p>25 A. For the use of the ingredients, I</p>	<p>143</p> <p>1 So I don't feel that I need it. I may be coming</p> <p>2 in contact with animal dander, but I'm not</p> <p>3 sensitive to the animal dander just because I have</p> <p>4 two cats.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. Okay. So the amount of time that is</p> <p>7 sufficient, I guess it depends on the</p> <p>8 circumstances of where the individual is or the</p> <p>9 particular sensitivities of the individual or even</p> <p>10 the nature of the material that's in the air?</p> <p>11 A. I would --</p> <p>12 MR. KREMEN: Objection to form.</p> <p>13 THE WITNESS: I'm sorry, I didn't hear</p> <p>14 what --</p> <p>15 MR. KREMEN: I said objection to the</p> <p>16 form of the question.</p> <p>17 You may answer.</p> <p>18 THE WITNESS: Okay. Just repeat, I'm</p> <p>19 sorry, I lost my train of thought.</p> <p>20 BY MS. PETERSON:</p> <p>21 Q. Okay. So the amount of time that's</p> <p>22 sufficient, it depends on the circumstances;</p> <p>23 right?</p> <p>24 A. Yes, I agree with that, yes.</p> <p>25 Q. Okay. So it could depend on where the</p>

October 24, 2022

<p>1 individual who's using the product is located?</p> <p>2 A. Yes. If you're in a highly polluted</p> <p>3 area, not necessarily pollution relative to</p> <p>4 bacterial pollution but irritants that may be in</p> <p>5 the air, if you happen to visit a place where</p> <p>6 people are smoking and you're highly sensitive to</p> <p>7 cigarette smoke or tobacco smoke, that may be a</p> <p>8 benefit for a person to possibly reapply. But I</p> <p>9 can't say definitely because I haven't done that</p> <p>10 testing.</p> <p>11 Q. So the amount of time that's sufficient,</p> <p>12 it could depend on the environment. It could</p> <p>13 depend on the particular sensitivities of the</p> <p>14 individual, as well; right?</p> <p>15 A. Yes.</p> <p>16 Q. It could also depend on the nature of</p> <p>17 the material that's in the air; right?</p> <p>18 A. Yes.</p> <p>19 Q. So certainly --</p> <p>20 A. Humidity. Humidity.</p> <p>21 Q. I'm sorry, I cut you off.</p> <p>22 A. No, humidity, a number of things that --</p> <p>23 you know, a person might actually touch their face</p> <p>24 a number of times, and by touching the face affect</p> <p>25 that which they applied. Not everyone can say</p>	<p>145</p> <p>1 it.</p> <p>2 Q. Okay. So the cohesive property is what</p> <p>3 sets up the impermeable barrier; right?</p> <p>4 A. Along with that adhesive property. I</p> <p>5 think it's a combination of the two.</p> <p>6 Q. Okay. And then how --</p> <p>7 A. Because it's a -- I'm sorry, because</p> <p>8 it's a thin film.</p> <p>9 Q. Okay.</p> <p>10 A. So I think you have to have both, the</p> <p>11 ability to hold it to the skin and at the same</p> <p>12 time have that cohesive property that will act to</p> <p>13 attract any of those harmful agents, particles,</p> <p>14 that might be in the airflow.</p> <p>15 Q. Okay. So the impermeable barrier is a</p> <p>16 result of the adhesive and cohesive properties of</p> <p>17 the formulation?</p> <p>18 A. That's how I interpret it, yes.</p> <p>19 Q. And those adhesive and cohesive</p> <p>20 properties can be different depending on the</p> <p>21 ingredients and the percentages of those</p> <p>22 ingredients in the formulation; right?</p> <p>23 A. Yes.</p> <p>24 Q. Which in turn can impact the level of</p> <p>25 impermeability?</p>
<p>146</p> <p>1 without touching their face for a significant</p> <p>2 period of time. There are studies that</p> <p>3 demonstrate that. Exactly, Liane.</p> <p>4 Q. I do it all the time.</p> <p>5 A. Thank you for demonstrating.</p> <p>6 Q. I just broke my rule. I was just wiping</p> <p>7 my nose for people reading the transcript.</p> <p>8 A. Okay.</p> <p>9 Q. Okay. So in turn, that sufficient</p> <p>10 time -- I think you've also explained that the</p> <p>11 impermeability of the film is also related to this</p> <p>12 concept of allowing enough time to hold those</p> <p>13 particles in place; right?</p> <p>14 A. Yes, and it's also the stickiness, the</p> <p>15 tackiness of the material that plays an important</p> <p>16 part relative to the cohesive property of the</p> <p>17 material. And it's that cohesive property that</p> <p>18 sets up that impermeable barrier. And that's --</p> <p>19 when considered with the adhesive property and the</p> <p>20 cohesive property, as the patent states, that's</p> <p>21 the ability to hold. And it's essentially holding</p> <p>22 it outside of the body as opposed to depending</p> <p>23 upon that which is naturally present in the</p> <p>24 nostrils to try to protect an individual along</p> <p>25 with their immune system. That's how I interpret</p>	<p>147</p> <p>1 A. Probably, yes.</p> <p>2 Q. And the ability of -- or the amount of</p> <p>3 time that the thin film acts as a barrier?</p> <p>4 A. Correct. But these would all be tests</p> <p>5 performed on the product beyond the scope of the</p> <p>6 patent. So, in other words, what I reiterated</p> <p>7 previously, in my experience in getting products</p> <p>8 on the market, if you have to do testing of your</p> <p>9 product, you have to -- in order to make the</p> <p>10 claims for your product, you need to generate the</p> <p>11 substantiation to support what you're saying about</p> <p>12 the product.</p> <p>13 So if I were putting a product on the</p> <p>14 market and I say reapply in four hours, I'm not</p> <p>15 taking that as an ambiguous period of time. I'm</p> <p>16 basing that on some sort of test parameter that I</p> <p>17 conducted in my laboratory or in the laboratory of</p> <p>18 the company before I go ahead and market that</p> <p>19 concept commercially.</p> <p>20 Q. Okay. And I think at the beginning of</p> <p>21 that answer you referred to that as being tests</p> <p>22 performed on the product beyond the scope of the</p> <p>23 patent. So is that referring to the fact that the</p> <p>24 patent doesn't describe any such testing of any of</p> <p>25 the formulations listed in the patent?</p>
<p>148</p>	<p>148</p>

October 24, 2022

<p>149</p> <p>1 A. Well, it proposes -- the patent proposes</p> <p>2 the concept of how it's going to work and its</p> <p>3 methodology. Okay. There -- I don't think that</p> <p>4 it's necessary to provide in the patent the end</p> <p>5 point, you know, what exactly you're going to see</p> <p>6 clinically. It's essentially presented as the</p> <p>7 concept in the patent and then any subsequent</p> <p>8 information that I'm referring to in the testing</p> <p>9 would be done post patent, if that makes it clear.</p> <p>10 Q. Okay. But just even more simply, the</p> <p>11 patent doesn't describe the results of any testing</p> <p>12 of that nature of any of the formulations that are</p> <p>13 listed; right?</p> <p>14 A. No.</p> <p>15 Q. Okay. Let's look at paragraph 39.</p> <p>16 Here, you state that the specification has a list</p> <p>17 of the formulation's generic ingredients.</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So this would be the categories of</p> <p>21 ingredients; right?</p> <p>22 A. That's what I referred to previously,</p> <p>23 and I believe that's in the patent. It's recited</p> <p>24 in the patent.</p> <p>25 Q. Okay. And is it your understanding that</p>	<p>151</p> <p>1 combinations, require certain components that</p> <p>2 might facilitate a better mixing of the</p> <p>3 ingredients and holding together. It's kind of</p> <p>4 like a jar of mayonnaise, you don't want -- you</p> <p>5 can make your own mayonnaise and it can separate</p> <p>6 out, but if you do it correctly, it should be</p> <p>7 consistent.</p> <p>8 Q. And an emulsifier would be required in</p> <p>9 order for a formulation to function as claimed in</p> <p>10 the patent?</p> <p>11 A. Yes.</p> <p>12 Q. And a neutralizing agent is necessary</p> <p>13 for a formulation to function as claimed in the</p> <p>14 patent?</p> <p>15 A. In that specific range, yes.</p> <p>16 Q. Okay. And an emollient would also be</p> <p>17 necessary to function as claimed in the patent.</p> <p>18 A. Yes, because it's applied to the skin.</p> <p>19 Q. Okay. Looking at the next page -- well,</p> <p>20 actually, just starting at 41, here you're talking</p> <p>21 about the ten example formulations in the patent;</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And then moving on to the next</p> <p>25 page, you state, "As long as the composition of</p>
<p>150</p> <p>1 each of these are required in order for a</p> <p>2 formulation to function as claimed in the patent?</p> <p>3 A. I believe so, yes.</p> <p>4 Q. So a quarternary thickener would be</p> <p>5 necessary?</p> <p>6 A. Yes, and that would be benzalkonium</p> <p>7 chloride that would be utilized. And some of</p> <p>8 these components may have multiple roles. That so</p> <p>9 benzalkonium chloride may act as a thickener but</p> <p>10 it may also act as a preservative and it may also</p> <p>11 act in the capacity of the cation contributor. It</p> <p>12 will also act as the biocide.</p> <p>13 Q. Okay. And conditioner would be required</p> <p>14 for the formulation to function as claimed in the</p> <p>15 patent?</p> <p>16 A. Yeah, I believe that's there primarily</p> <p>17 because it's coming in contact with the skin and</p> <p>18 so that certain ingredients or certain</p> <p>19 components -- as a formulator you would</p> <p>20 anticipate, you know, how the product is going to</p> <p>21 be used and that you don't want to apply something</p> <p>22 to the skin that's going to be irritating to the</p> <p>23 skin.</p> <p>24 Also, sometimes ingredients, in order to</p> <p>25 blend together, you know, when you're making</p>	<p>152</p> <p>1 ingredients remains within the specified ranges,</p> <p>2 the example formulations should function as</p> <p>3 disclosed."</p> <p>4 Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. And what's the basis for that</p> <p>7 statement?</p> <p>8 A. That is what I mentioned earlier so</p> <p>9 that, if I go back to my benzalkonium chloride --</p> <p>10 sometimes people will abbreviate that as BZK, just</p> <p>11 so that it's not a mouthful of words. But</p> <p>12 essentially what I'm saying is you really want to</p> <p>13 have a level of ingredient that is safe and</p> <p>14 effective as two key components. You don't want</p> <p>15 to exceed that because it can potentially be</p> <p>16 irritating.</p> <p>17 Remember, it's used as a disinfecting</p> <p>18 agent, and if you touch detergent or some other</p> <p>19 caustic material, you can get skin irritation, and</p> <p>20 degree of sensitivity varies from person to</p> <p>21 person.</p> <p>22 Q. Okay. I guess I was wondering about --</p> <p>23 I also had a question about your conclusion that</p> <p>24 the formulations should function as disclosed as</p> <p>25 long as the ingredients remain within the</p>

October 24, 2022

<p>153</p> <p>1 specified ranges. So you're not offering the</p> <p>2 opinion that as long as the ingredients remain</p> <p>3 within those specified ranges, they will</p> <p>4 necessarily and will always function as claimed?</p> <p>5 A. The ingredients should support the claim</p> <p>6 that's made for the product.</p> <p>7 Q. I'm not sure I understand that.</p> <p>8 A. So, for example, if you're including --</p> <p>9 if you're including in your claim that the product</p> <p>10 contains a biocide, you should have a biocide in</p> <p>11 your product. And it should be at a range that is</p> <p>12 useful and applicable for that type of a product.</p> <p>13 That's essentially what I'm referring to.</p> <p>14 Q. Okay. But we looked at the claims</p> <p>15 earlier, and the claims don't recite all of these</p> <p>16 different categories of ingredients; right?</p> <p>17 A. Right. That's correct.</p> <p>18 Q. Okay. So I guess what I'm asking is</p> <p>19 based on what I see you say in paragraph 41, it</p> <p>20 doesn't appear that you're providing the opinion</p> <p>21 that as long as the ingredients in those ten</p> <p>22 formulations remain within the specified ranges,</p> <p>23 they will necessarily function as claims in the</p> <p>24 '802 patent?</p> <p>25 MR. KREMEN: Objection; form.</p>	<p>155</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Okay. And so as long as you stay within</p> <p>3 the ranges in the tables of the patent, then the</p> <p>4 formulation should work. It should have the right</p> <p>5 level of adhesion and cohesion --</p> <p>6 A. I would hope so.</p> <p>7 (Cross talk.)</p> <p>8 A. I would hope so, yes.</p> <p>9 Q. And how do you -- do you know for</p> <p>10 certain that every formulation within the stated</p> <p>11 ranges will have that sufficient level of adhesion</p> <p>12 and cohesion in order to create an impermeable</p> <p>13 thin film that will work as described in the</p> <p>14 claimed invention?</p> <p>15 MR. KREMEN: Objection; form.</p> <p>16 THE WITNESS: But I will answer. It</p> <p>17 goes back to the categories. It goes back to the</p> <p>18 categories that were mentioned previously. For</p> <p>19 each recitation of the tables, I have not</p> <p>20 personally done any work to test if that will work</p> <p>21 the same, if Table 5 works the same as Table 7.</p> <p>22 At this point for what I've been exposed</p> <p>23 to and what I've read, I cannot tell you in</p> <p>24 certainty that 5 and 7 will work identically. I</p> <p>25 assume that they do, but I haven't done any</p>
<p>154</p> <p>1 THE WITNESS: I'll try to clarify, if</p> <p>2 that's okay. Some ingredients in products -- and</p> <p>3 you'll see this on labels -- are considered inert.</p> <p>4 They are really not there for a specific</p> <p>5 functional property, but they are inert because</p> <p>6 they're needed as a vehicle or a protective agent</p> <p>7 or a cohesive agent, whatever that might be.</p> <p>8 So certain ingredients are placed, I'll</p> <p>9 give you an example, in some formulations to</p> <p>10 deliver simply a vitamin. You may put an</p> <p>11 ingredient that's nonnutritive because to deliver</p> <p>12 it, it would not be appropriate on its own. So</p> <p>13 you have to provide it with something else. So</p> <p>14 they facilitate -- as inert ingredients, they</p> <p>15 facilitate the delivery of the product. That's</p> <p>16 not site specific delivery, but just delivery of</p> <p>17 the product in the specified form.</p> <p>18 So in this particular case where it is a</p> <p>19 thin film that's going to be applied in and around</p> <p>20 the nostrils, you don't want that material to drip</p> <p>21 out, go into the channel, whatever area of the</p> <p>22 face. You want it to remain in place, to hold it</p> <p>23 in place for a specific period of time. And</p> <p>24 ingredients facilitate each other in working kind</p> <p>25 of like a concert when a formulation is developed.</p>	<p>156</p> <p>1 testing on it. It would be unfair of me to make</p> <p>2 that judgment.</p> <p>3 BY MS. PETERSON:</p> <p>4 Q. And what is that assumption based on?</p> <p>5 A. My experience primarily, my experience</p> <p>6 in putting formulas together.</p> <p>7 Q. Okay. So that assumption, it's not</p> <p>8 based on any information or testing that you read</p> <p>9 in the patent; right?</p> <p>10 A. No, it's not.</p> <p>11 Q. Okay. Let's go to the next page of your</p> <p>12 declaration. And do you see here there's a</p> <p>13 heading that says "Disputed Claim Terms of the</p> <p>14 '802 Patent"?</p> <p>15 A. Yes.</p> <p>16 Q. In this first paragraph, 45, you start</p> <p>17 off by saying, "I am not an attorney. I</p> <p>18 understand that the property of a claim being</p> <p>19 indefinite is a legal determination, which is in</p> <p>20 the province of the Court."</p> <p>21 And then you go on to say, "I will opine</p> <p>22 on whether the disputed claim terms are</p> <p>23 sufficiently unambiguous to enable one of ordinary</p> <p>24 skill to understand and practice the inventions</p> <p>25 set forth in the claims."</p>

October 24, 2022

<p>157</p> <p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So that last sentence, does that</p> <p>4 accurately describe the standard that you applied</p> <p>5 in forming your opinions?</p> <p>6 A. Yes, because I'm not a patent attorney,</p> <p>7 and my experience with patents has been primarily</p> <p>8 to review patents that were presented to me to</p> <p>9 give an opinion on. And that may be related to</p> <p>10 my -- not necessarily my academic experience but</p> <p>11 more so in my corporate experience and as a</p> <p>12 consultant to advise people if this is junk</p> <p>13 science, does this mean anything, can you use it.</p> <p>14 Many people would come to a corporation</p> <p>15 presenting their products or their concepts of a</p> <p>16 product or whatever in order to get the</p> <p>17 corporation to back it and to do the necessary</p> <p>18 support to do further testing. And so to protect</p> <p>19 the corporation, people like myself would be</p> <p>20 employed to do the evaluation. But I'm not an</p> <p>21 attorney. In every corporate setting I've worked</p> <p>22 with attorneys like yourself and Mr. Kremen, and</p> <p>23 they have asked me as many questions as you do,</p> <p>24 but not under these circumstances.</p> <p>25 Q. So did Mr. Kremen provide you with an</p>	<p>159</p> <p>1 Q. So about halfway through this paragraph,</p> <p>2 you have a sentence that starts, "From the</p> <p>3 remainder of each of Claim 1 or 2."</p> <p>4 Do you see that? It's about halfway</p> <p>5 through the paragraph.</p> <p>6 A. Is it about halfway? I'm just trying to</p> <p>7 find the -- but you can go forward. I'll follow</p> <p>8 you.</p> <p>9 Q. Yeah, I'm just going to read from your</p> <p>10 report. So you explain that, "From the remainder</p> <p>11 of each Claim 1 or 2, supported by the</p> <p>12 specification, the claim elements involve</p> <p>13 electrostatic fields" --</p> <p>14 A. Yes.</p> <p>15 Q. -- right?</p> <p>16 Okay. So it's your understanding, then,</p> <p>17 that Claims 1 and 2 are directed to using these</p> <p>18 electrostatic fields; right?</p> <p>19 A. The electrostatic field that's generated</p> <p>20 by the formulation, yes.</p> <p>21 Q. Okay. And then you also go on to say</p> <p>22 that, "Claims 1 and 2 refer to electrostatic</p> <p>23 attraction, which is a well-known scientific</p> <p>24 phenomenon even to a high school physics student";</p> <p>25 right?</p>
<p>158</p> <p>1 explanation of the legal standard that the</p> <p>2 court --</p> <p>3 A. I had asked --</p> <p>4 Q. -- uses to determine --</p> <p>5 A. Yeah, I had -- I'm sorry.</p> <p>6 Q. -- whether a claim term is indefinite?</p> <p>7 A. I have asked him what the meaning is,</p> <p>8 yes.</p> <p>9 Q. And did you include his explanation in</p> <p>10 your report?</p> <p>11 A. In my own words, yes.</p> <p>12 Q. Okay. And those words are what we read</p> <p>13 here on paragraph 45?</p> <p>14 A. That's correct.</p> <p>15 Q. Okay.</p> <p>16 A. Again, as a non-attorney, it's very</p> <p>17 difficult for me to write legalese. I cannot do</p> <p>18 that. I tried my best, but I cannot.</p> <p>19 Q. Okay.</p> <p>20 MS. PETERSON: Let's go to the next</p> <p>21 page, please.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. Paragraph 48, here you're discussing the</p> <p>24 claim term "electrostatically inhibiting"; right?</p> <p>25 A. Yes, that's correct.</p>	<p>160</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. And the formulation that's</p> <p>3 claimed in the '802 patent, it operates by this</p> <p>4 phenomenon of electrostatic attraction; right?</p> <p>5 A. Yes, it's positive charged particles</p> <p>6 that attract the negative charged particles and</p> <p>7 repel all the positive charged particles that may</p> <p>8 be in the atmosphere.</p> <p>9 Q. Okay.</p> <p>10 MS. PETERSON: Let's move ahead two</p> <p>11 pages, and we'll look at paragraph 51.</p> <p>12 BY MS. PETERSON:</p> <p>13 Q. And, again, here you're viewing the</p> <p>14 claim term "adequate impermeability" in the</p> <p>15 context of what you describe as the "hold"</p> <p>16 function of the claims; right?</p> <p>17 A. That's correct. I consider that to be</p> <p>18 one of the most important elements of the product.</p> <p>19 Q. Okay.</p> <p>20 A. Or the patent.</p> <p>21 Q. Okay.</p> <p>22 MS. PETERSON: Let's go on to the next</p> <p>23 page, which is a continuation of paragraph 53.</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. So right at the top of this page, you</p>

October 24, 2022

<p>161</p> <p>1 state that, "Determination of adequate perm 2 ability is a term of degree"; right?</p> <p>3 A. Yes.</p> <p>4 Q. And that in turn is going to depend on 5 the desired efficacy?</p> <p>6 A. Yes.</p> <p>7 Q. And the desired efficacy could also 8 depend on the nature of the harmful particles to 9 be captured by the formulation and infection 10 inhibited by?</p> <p>11 A. Yes.</p> <p>12 Q. That was a bad sentence.</p> <p>13 A. I know. I'm not correcting your 14 grammar. But just for clarification, my 15 understanding, again, it depends on, in a 16 microbiological standpoint, the type of organism, 17 the quantity of organism that a person would be 18 coming in contact with.</p> <p>19 So you are assuming that you have this 20 capacity to trap -- and I think that's one of the 21 reasons why one of the -- one of the reasons why 22 they decided to change it from "preventing" to the 23 term "inhibiting" so that it's to trap a quantity 24 of harmful bacteria, you know, as best as you can 25 so that you reduce that tighter load that might</p>	<p>163</p> <p>1 all tend to sneeze a little bit more during those 2 periods of time. It's because the levels are very 3 high. But throughout the year, we're exposed to 4 pollens, and it may not give us any degree of eye 5 irritation or nasal irritation causing us to 6 sneeze.</p> <p>7 Q. Okay. And so using that example then, 8 if we're in allergy season where there's a high 9 amount of allergens in the air, you might need a 10 formulation that has increased adhesive and 11 cohesive properties with a more impermeable 12 barrier in order to sufficiently capture and hold 13 those particles and preventing them from -- or 14 inhibiting them from infecting the individual; 15 right?</p> <p>16 A. Or you may want to apply the product 17 more frequently. So I --</p> <p>18 Q. And that would be because the adhesive 19 properties would impact how long the formulation 20 stays as a thin film?</p> <p>21 A. Well, how long it's going -- well, how 22 much you're coming in contact with -- you know, 23 some people come in contact with very polluted 24 environments, but on an average basis -- again, 25 this is not a prescription, but on an average</p>
<p>162</p> <p>1 be -- that the individual who would be classified 2 as the host would be experiencing.</p> <p>3 Q. And so, of course, you know, the 4 particular nature of the particles will have an 5 impact on how many need to be held by the 6 impermeable thin film in order to prevent 7 infection; right?</p> <p>8 A. That's correct. And that ties in with 9 my statement previously regarding the stickiness 10 or the tackiness of that material. It's very 11 important. Because you don't want these particles 12 to be bouncing off and going into the nasal 13 passage, at least that's how I understand the 14 concept.</p> <p>15 Q. Okay. So if one were to design a 16 formulation that has, you know, reasonable 17 adhesion and cohesion and creates a thin film of 18 reasonable impermeability, that might be enough to 19 prevent infection by, you know, some microorganism 20 that's not particularly harmful or where the 21 tighter or the amount in the environment is 22 relatively low; right?</p> <p>23 A. Yes, I think the example would be during 24 pollen season when you have high pollen counts. 25 Whether you have a pollen sensitivity or not, we</p>	<p>164</p> <p>1 basis a product that you have sold 2 over-the-counter is something that's left up to 3 the individual to make a judgment as far as how 4 much and how often they use the product.</p> <p>5 As I said earlier, in my own personal 6 experience of using the product, I use it when I'm 7 in a setting where I do have individuals who are 8 unknown to me. So if I get on a bus, I'm 9 definitely going to use this product.</p> <p>10 Q. Okay. And then from the formulator 11 perspective, how does the formulator determine 12 what the desired level of permeability is?</p> <p>13 A. The formulator would make that judgment 14 on the -- as I said earlier, the degree of 15 stickiness or tackiness of the actual product. 16 So, again, you would probably conduct experiments 17 to do that.</p> <p>18 In this particular case, the process was 19 tested on the basis of the electrostatic surface 20 charge so that if the levels were there to 21 adequately meet a standard that they are claiming 22 that the product can do to attract these 23 particles, you would have that as your -- at least 24 in part, your substantiation that you set up that 25 field.</p>

October 24, 2022

<p>1 Q. Okay. Isn't it also your opinion that 2 the electrostatic field that is generated alone is 3 not sufficient to meet the claim elements of 4 capturing and holding? 5 A. The electrostatic -- 6 MR. KREMEN: Objection to the form of 7 the question. 8 THE WITNESS: You may want to rephrase 9 that for me. 10 BY MS. PETERSON: 11 Q. Isn't it also your opinion that the 12 electrostatic field that's generated from the 13 formulation, that alone is not sufficient to 14 achieve the claim elements of capturing and 15 holding? 16 MR. KREMEN: Same objection. 17 THE WITNESS: And my answer is no. The 18 electrostatic field is -- or the electrostatic 19 charge that's set up is an important element of 20 how this product works. That's the methodology. 21 BY MS. PETERSON: 22 Q. Okay. And how does that relate, then, 23 to everything you were just discussing here about 24 the need to have adequate adhesion and cohesion 25 and impermeability to the thin film?</p>	<p>165 167 1 done. And I think the testing for the properties 2 that we're looking at relate back to the type of 3 surface charge that the product possesses. So 4 you're looking for -- as I'm speaking I'm shaking 5 the monitor here, I'm sorry. 6 What you're doing is you're looking 7 essentially to set up that field where you're 8 setting up that barrier. 9 Q. Right. So -- 10 A. And you're measuring that electrostatic 11 charge. Because, again, you're looking at 12 positive and negative particles that have to be 13 trapped -- or negative particles that are in the 14 airstream that have to be trapped by the positive 15 field that's set up on that barrier. 16 So, you know, you could look at it in 17 different ways. You could look at it from its 18 chemistry, but you could also look at it from the 19 physics of it, which is more related to that 20 electrostatic charge. 21 Q. So when you say these concepts are 22 related, does that mean that you could have a 23 lower level of adhesion and cohesion in the 24 formulation as long as the formulation exhibits a 25 high electrostatic charge?</p>
<p>166 1 A. They all tie in, because the charge is 2 generated by those ingredients that's setting up 3 that impermeable setting. You don't want it to 4 bypass it. You want it to hold on to those 5 contaminants, be it biological or otherwise, so 6 that the person does not inhale large quantities. 7 And you want to do that outside of the respiratory 8 track, per se. 9 Q. Okay. So I asked you earlier how 10 does -- from a formulator perspective, how do they 11 achieve the desired permeability and you referred 12 to the adhesive and cohesive properties of the 13 formulation. 14 Do you recall that? 15 A. Yes. 16 Q. And how does the formulator -- oh, 17 sorry, strike that. 18 Those adhesive and cohesive properties 19 can be different depending on the ingredients and 20 the percentages of ingredients used in the 21 formulation; right? 22 A. Yes. 23 Q. So how does the formulator decide how 24 adhesive it needs to be? 25 A. Well, that's the testing that would be</p>	<p>168 1 MR. KREMEN: Objection to the form of 2 the question. 3 THE WITNESS: Can I answer? 4 MR. KREMEN: Yeah, you can answer. 5 THE WITNESS: I mean, I feel that, 6 again, the amounts -- the amounts -- what has to 7 be provided is that you are able to set up that 8 impermeable field, that it has to be adequately 9 supplied. So, for example, if I simply take my 10 finger and touch, you know, the product and just 11 put it at the tip of my nose, I won't probably get 12 the same kind of effect as taking the product, 13 putting an adequate amount and spreading it around 14 the whole surface of the nose and maybe putting a 15 little bit in the nostrils to give me that much 16 more barrier of protection. 17 BY MS. PETERSON: 18 Q. So the -- to achieve the adequate 19 impermeability recited in the claims, that's also 20 going to depend on how the product is applied by 21 the user? 22 A. I would assume so, yes. 23 Q. Okay. 24 A. But, again, a lot of that is tied in 25 with any of the materials that are supplied --</p>

October 24, 2022

<p style="text-align: right;">169</p> <p>1 excuse me, any of the materials that are supplied 2 with the product. So in my experience, when a 3 product has to be taken by mouth, you have to tell 4 the person, take by mouth because you don't know 5 how that person is going to utilize that product. 6 Q. Okay. So you're talking about 7 instructions that are provided with a commercial 8 product? 9 A. That's correct. 10 Q. You're not talking about instructions 11 that are provided in the '802 patent; right? 12 A. Not in the patent; correct. 13 Q. Okay. And what does the patent say 14 about what the desired level of impermeability is 15 for inhibiting infection caused by influenza 16 virus? 17 A. I don't remember exactly if it states 18 that. So I'm at a disadvantage to respond to that 19 question right now. 20 Q. So you're not aware of anything in the 21 '802 patent that identifies what the appropriate 22 level of permeability is for inhibiting infection 23 for any of the specific organisms or diseases that 24 are listed in the patent; right? 25 MR. KREMEN: Objection to form.</p>	<p style="text-align: right;">171</p> <p>1 this point if there is. 2 BY MS. PETERSON: 3 Q. Okay. So that's your answer, you don't 4 remember? 5 A. I don't remember. 6 Q. Okay. 7 MS. PETERSON: Let's go to the next 8 page. 9 BY MS. PETERSON: 10 Q. And for reference, this is a 11 continuation of paragraph 55 of your declaration. 12 Here, you're talking about the claim term "renders 13 said particulate matter harmless"; right? 14 A. Yes. 15 Q. This is a long paragraph, but do you see 16 in the middle of the screen here there's a 17 sentence that says -- it starts "Further" and then 18 it says (at 3 -- that's Column 3, line 12 of the 19 patent. 20 Do you see that? 21 A. Yes. 22 Q. Okay. So you're referring to Column 3, 23 line 12 of the patent specification here. And you 24 quote a sentence that includes the language 25 "simultaneously inactivate, kill, or render</p>
<p style="text-align: right;">170</p> <p>1 THE WITNESS: I don't think that was 2 necessary at the time that the patent was written. 3 It's simply presenting the concept of how this 4 thing should work, but not -- there's no efficacy 5 data, at least in my understanding, that would be 6 required to incorporate into the patent. 7 BY MS. PETERSON: 8 Q. Okay. Well, putting aside whether it's 9 required or not, you didn't see anything like that 10 in the patent; right? 11 A. Not to my recollection. 12 Q. No recommendations or instructions as to 13 the level of impermeability that's required for 14 particular harmful properties? 15 A. At this point, I probably -- I don't 16 recall if it is there. I may have read it, and I 17 just don't remember. I'm sorry. 18 Q. I didn't see it. I just want to make 19 sure that there isn't something that I was 20 missing. And it sounds like there wasn't? 21 MR. KREMEN: Objection. 22 THE WITNESS: I think I've read, you 23 know, the patent a number of times to feel 24 comfortable with it before I speak to you or 25 anybody else about it. But I can't remember at</p>	<p style="text-align: right;">172</p> <p>1 harmless the microorganisms so trapped." 2 Do you see that? 3 A. Yes. 4 Q. And then you go on to say that, "The 5 significance of this statement is the correlative 6 conjunction 'or'?" 7 A. Yes. 8 Q. What's the significant of "or" to you 9 here? 10 A. Well, my interpretation is that the 11 benzalkonium chloride as the biocide should kill 12 the live organism or render it unavailable to the 13 host, render harmless -- or render harmless, 14 meaning if you have something that's not something 15 to be virulent but it can be irritant, that's what 16 I'm referring to. 17 So you could have -- as I mentioned 18 earlier, you could have exposure to particles in 19 smoke-filled air. You could have particles that 20 are classified as pollutants or xenobiotics, and 21 they do not necessarily pose a serious health 22 threat to the host, but they could be rendered 23 harmless by being neutralized by that 24 electrostatic charge that's on that membrane or as 25 a result of using the product around the nose.</p>

October 24, 2022

<p>173</p> <p>1 Q. So rendered harmless, in your</p> <p>2 understanding then, can mean either inactivation</p> <p>3 or killing?</p> <p>4 A. More so trapping, trapping them so</p> <p>5 that -- if it's not a viable material, why would</p> <p>6 you want to kill it? You want to trap it. You</p> <p>7 want to stop it from going into or prevent it</p> <p>8 somehow from going into the nasal passages.</p> <p>9 Inhibiting is going to slow things down.</p> <p>10 Preventing is pretty much going to stop it.</p> <p>11 So I think what you want to do is you</p> <p>12 could come in contact with the pollen at a lower</p> <p>13 concentration and maybe the result of that will be</p> <p>14 simply to sneeze, but you're not going to have a</p> <p>15 severe allergic reaction. So it renders it</p> <p>16 harmless. That's how I understood it.</p> <p>17 Q. Okay. I'm not sure I followed all of</p> <p>18 that. So render harmless, it means trapped?</p> <p>19 A. I see that more as trapping it, yes.</p> <p>20 Q. Okay.</p> <p>21 A. Stopping it outside of the nasal cavity.</p> <p>22 Q. Okay. And that trapping relates to the</p> <p>23 electrostatic attraction?</p> <p>24 A. Correct.</p> <p>25 Q. Okay.</p>	<p>175</p> <p>1 A. No, that could be -- I would consider</p> <p>2 that to be an extreme microorganism where large</p> <p>3 numbers of those spores could potentially be very</p> <p>4 detrimental to a person coming in contact with</p> <p>5 that.</p> <p>6 Q. Okay. But --</p> <p>7 A. No, I'm sorry. No, that's fine. You</p> <p>8 can go forward.</p> <p>9 Q. Okay. But there are some microorganisms</p> <p>10 where even if only a few of the organisms make it</p> <p>11 into the body, that will be sufficient to cause</p> <p>12 infection in that individual?</p> <p>13 A. Yes, that can happen, yes.</p> <p>14 Q. Let's move forward to -- one more page,</p> <p>15 I think it's the last page of your declaration.</p> <p>16 A. Okay.</p> <p>17 Q. And here in paragraph 56, you're talking</p> <p>18 about how patent claims are often incomprehensible</p> <p>19 by laypersons; right?</p> <p>20 A. Yes.</p> <p>21 Q. But you here are offering the opinion</p> <p>22 that in the case of Claims 1, 2, 6, and 7 of the</p> <p>23 '802 patent, the words appear to have their plain</p> <p>24 meaning; right?</p> <p>25 A. Yes.</p>
<p>174</p> <p>1 A. Or that electrostatic charge that's set</p> <p>2 up as the barrier. Because if you look at it as a</p> <p>3 wall of positive charge, anything that's going to</p> <p>4 pass towards that wall that's set up is going to</p> <p>5 stick to it.</p> <p>6 Q. Okay. Now, you also looked at the</p> <p>7 prosecution history of the '802 patent; right?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And you recall that the claim</p> <p>10 terms were changed from "preventing" to</p> <p>11 "inhibiting"; right?</p> <p>12 A. Yes.</p> <p>13 Q. And the examiner's rationale was that</p> <p>14 preventing implies that all harmful particulate</p> <p>15 matter is captured --</p> <p>16 A. Yes.</p> <p>17 Q. -- as opposed to inhibiting, which could</p> <p>18 allow some of the harmful particulate matter</p> <p>19 through?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Would you agree that something</p> <p>22 that's very toxic or, you know, extremely</p> <p>23 virulent, like anthrax, if even a small amount</p> <p>24 gets through, that that would not be rendering it</p> <p>25 harmless?</p>	<p>176</p> <p>1 Q. Okay. So you would agree that the claim</p> <p>2 terms as used in the Claims 1, 2, 6, and 7 of the</p> <p>3 '802 patent just use their plain and ordinary</p> <p>4 meaning as understood by a person of skill in the</p> <p>5 art?</p> <p>6 A. By a person of ordinary --</p> <p>7 MR. KREMEN: Objection to form.</p> <p>8 THE WITNESS: Can I answer?</p> <p>9 MR. KREMEN: Yeah, go ahead.</p> <p>10 THE WITNESS: I felt that a person of</p> <p>11 ordinary skill reading the claim -- and, again,</p> <p>12 going back to my example of a student in high</p> <p>13 school understanding basic physics and positive</p> <p>14 and negative charges would be able to navigate</p> <p>15 those statements.</p> <p>16 In my experience reading patents, some</p> <p>17 of the patent claims are extremely written for a</p> <p>18 person of very high-level understanding. And it</p> <p>19 prohibits that average layperson to pick that up</p> <p>20 and be able to interpret what is recited in the</p> <p>21 body of the patent, as well as in the specific</p> <p>22 claims.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. Okay. But that's not what you</p> <p>25 understand to be the case for the '802 patent</p>

October 24, 2022

<p>177</p> <p>1 claims; right?</p> <p>2 A. I understand that the '802 patent claims</p> <p>3 are written in language that should be understood</p> <p>4 by a person of ordinary skill.</p> <p>5 Q. Okay. So there's no particular</p> <p>6 essential meaning to any of the particular claims</p> <p>7 apart from what a person of ordinary skill in the</p> <p>8 art would understand to be their plain and</p> <p>9 ordinary meaning?</p> <p>10 MR. KREMEN: Objection.</p> <p>11 THE WITNESS: To be perfectly honest, I</p> <p>12 looked at that patent, and I see a very simple</p> <p>13 concept being presented with a simple solution so</p> <p>14 that a person of ordinary skill should be able to</p> <p>15 read that and have some degree of understanding of</p> <p>16 what's in those claims.</p> <p>17 MS. PETERSON: Okay. I'm at a good</p> <p>18 stopping point right now. Let's go off the</p> <p>19 record.</p> <p>20 THE WITNESS: Okay.</p> <p>21 THE VIDEOGRAPHER: We're going off the</p> <p>22 record. The time is now 3 p.m.</p> <p>23 (Recess from the record.)</p> <p>24 THE VIDEOGRAPHER: We're back on the</p> <p>25 record. The time is now 3:12 p.m.</p>	<p>179</p> <p>1 Q. Okay. And you're not aware of anything</p> <p>2 else any other documents or information that you</p> <p>3 reviewed in forming your opinions that aren't</p> <p>4 mentioned in the report?</p> <p>5 A. I'm sorry, I was just distracted by</p> <p>6 something. Just please repeat the question, I'm</p> <p>7 sorry.</p> <p>8 Q. You're not aware of anything else, any</p> <p>9 other documents or other information that you</p> <p>10 reviewed in forming your opinions that aren't</p> <p>11 specifically mentioned in the report?</p> <p>12 A. No. No, there's nothing else.</p> <p>13 Q. Okay. And I think we established this</p> <p>14 earlier, this report was prepared in response to</p> <p>15 Dr. Amiji's opening expert report on invalidity;</p> <p>16 correct?</p> <p>17 A. That's correct.</p> <p>18 Q. Okay. And other than your opinion</p> <p>19 directed to the enablement of the Rolf patent</p> <p>20 application, your report does not provide any</p> <p>21 other opinions with respect to any of the other</p> <p>22 prior art identified and relied upon by Dr. Amiji;</p> <p>23 right?</p> <p>24 A. That's correct.</p> <p>25 Q. And with respect to the Rolf patent</p>
<p>178</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Dr. Lemmo, I'll ask you again, have you</p> <p>3 discussed the substance of your deposition</p> <p>4 testimony with anybody during any of the breaks</p> <p>5 that we've taken today?</p> <p>6 A. No, I did not.</p> <p>7 Q. Okay. Thank you.</p> <p>8 Okay. I'd like to turn back to your</p> <p>9 responsive report.</p> <p>10 MS. PETERSON: We can pull that up.</p> <p>11 It's Exhibit 14.</p> <p>12 MR. KREMEN: 14. Responsive report on</p> <p>13 validity.</p> <p>14 BY MS. PETERSON:</p> <p>15 Q. So, Dr. Lemmo, I did not see a separate</p> <p>16 list of materials that you reviewed in connection</p> <p>17 with preparing this report; is that right?</p> <p>18 A. That's correct. Anything, if I had</p> <p>19 additional materials, would have been submitted.</p> <p>20 Q. Okay. So would it be fair to say, then,</p> <p>21 that everything you reviewed or considered in</p> <p>22 forming the opinions expressed in your responsive</p> <p>23 report would have been cited directly in your</p> <p>24 report?</p> <p>25 A. Yes.</p>	<p>180</p> <p>1 application, your report does not provide any</p> <p>2 opinions with respect to whether the claims of the</p> <p>3 '802 patent would be obvious in view of Rolf in</p> <p>4 combination with any other prior art; right?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay.</p> <p>7 MS. PETERSON: Let's turn to page 6,</p> <p>8 which is page 7 of the PDF.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. And this is the section of your opinion</p> <p>11 relating to the "hold" function; right?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. So looking at the second</p> <p>14 sentence, your opinion is that the claimed</p> <p>15 invention uses electrostatic forces to attract</p> <p>16 particulate matter before entering the nasal</p> <p>17 passageway; right?</p> <p>18 A. That's correct.</p> <p>19 Q. But that's --</p> <p>20 MR. KREMEN: That's -- you're</p> <p>21 misquoting. Before entering the body's</p> <p>22 respiratory system.</p> <p>23 MS. PETERSON: Okay.</p> <p>24 BY MS. PETERSON:</p> <p>25 Q. Well, looking at the beginning of the</p>

October 24, 2022

<p>181</p> <p>1 sentence, it states that "the product attracts 2 particulate matter from the airflow before 3 entering the nasal passageway using [sic] 4 electrostatic forces"; correct?</p> <p>5 A. That's correct. And the nasal passage 6 is considered physiologically a part of the 7 respiratory system.</p> <p>8 Q. Okay. Now, you go on to then say, 9 though, that "this alone is insufficient to 10 protect the individual from harmful particulate 11 matter entering the body's respiratory system"; 12 right?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. So the electrostatic force 15 created by the formulation alone does not protect 16 the individual from harmful particulate matter 17 entering the body, and likewise would not protect 18 that individual or inhibit infection from those 19 materials; right?</p> <p>20 MR. KREMEN: Objection to form. 21 You may answer. 22 THE WITNESS: The electrostatic charge 23 addresses the negatively charged particles that 24 are in the airflow, but it does not address 25 anything else. So if particles in the airflow are</p>	<p>183</p> <p>1 Q. Okay. So a formulation that exhibits an 2 electrostatic charge upon application to the skin 3 might not necessarily have the right amount of 4 adhesion or cohesion to perform that "hold" 5 function of the claims; right?</p> <p>6 A. That's correct.</p> <p>7 MR. KREMEN: Objection to form. 8 BY MS. PETERSON:</p> <p>9 Q. So, in other words, a formulation or a 10 composition would need more than just a positive 11 charge to meet Claims 1 and 2 of the '802 patent?</p> <p>12 A. Well, you want the material to adhere, 13 or you want it to remain being held by the 14 material that you're applying to the skin. And 15 that's what I see as an important thing. Just 16 having the electrostatic charge without the 17 ability to hold the product, an electrostatic 18 field could either repel or attract different 19 things. And that's -- you know, that's one aspect 20 of it.</p> <p>21 I think the other part is really -- or 22 what I consider to be an extremely important part 23 is that "hold" function, and that's why I probably 24 was more focused at the time that I wrote this 25 document.</p>
<p>182</p> <p>1 negatively charged, the positive charge of the 2 product is going to be a significant player. 3 I think my point in this paragraph is 4 the importance of the "hold" function. You don't 5 want particles to be bouncing off that surface 6 where the product had been applied and then picked 7 up into the nasal passage. 8 BY MS. PETERSON:</p> <p>9 Q. Okay.</p> <p>10 A. So hold -- I keep going back to that 11 "hold" function because it's inhibiting them from 12 going into that respiratory system.</p> <p>13 Q. Okay. So, in other words, the 14 electrostatic charge of the formulation alone is 15 not sufficient for a product to function, 16 according to the claim. It also requires this 17 "hold" function that's recited in the claim, as 18 well; right?</p> <p>19 A. Yes. I would agree with that, yes.</p> <p>20 Q. Okay. And that "hold" function -- we've 21 covered this repeatedly, but it's related to those 22 adhesive and cohesive properties of the 23 formulation and the permeability of the film upon 24 application of the formulation; correct?</p> <p>25 A. Exactly, yes.</p>	<p>184</p> <p>1 Q. So let me just see if I can repeat that 2 because I just want to make sure I have an answer 3 to my question. 4 So a formulation that exhibits an 5 electrostatic charge upon the application to the 6 skin might not necessarily have the right amount 7 of adhesion or cohesion to perform that hold 8 function, which is also a necessary component of 9 the claims; right?</p> <p>10 A. Yes, that's correct.</p> <p>11 Q. Okay. Let's move ahead to -- I think 12 it's page 9 of your report. It's page 10 of the 13 PDF. And this is the section where you discuss 14 the Rolf patent application; correct?</p> <p>15 A. Yes, that's correct.</p> <p>16 MR. KREMEN: That's the -- where it says 17 paragraph 3, "The Rolf Patent Application?"</p> <p>18 MS. PETERSON: Yeah, I'm not sure if 19 it's a paragraph or a section heading, but yes.</p> <p>20 MR. KREMEN: Yeah, right.</p> <p>21 MS. PETERSON: "3, Rolf Patent 22 Application, that's where we are.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. Okay. You understand that essential 25 oils are cationic; right?</p>

October 24, 2022

<p>185</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. And so when essential oils are</p> <p>3 applied to the skin, they will exhibit a surface</p> <p>4 electrostatic charge?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay. On the next page, if we scroll</p> <p>7 down, the first full paragraph, you note that</p> <p>8 there are some "limitations associated with the</p> <p>9 use of essential oils"; right?</p> <p>10 A. Yes, that's correct.</p> <p>11 Q. So they may have skin irritating</p> <p>12 properties?</p> <p>13 A. Correct.</p> <p>14 Q. Or severe toxicity profiles?</p> <p>15 A. Correct.</p> <p>16 Q. And that would depend on the amount that</p> <p>17 is used of the essential oil; right?</p> <p>18 A. That would be one component, yes.</p> <p>19 Q. And that would also depend on the</p> <p>20 concentration of the essential oil within the</p> <p>21 product; right?</p> <p>22 A. Correct.</p> <p>23 Q. So not all essential oils in all</p> <p>24 concentrations and in all amounts will cause skin</p> <p>25 irritation; right?</p>	<p>187</p> <p>1 of applications, particularly for therapeutic --</p> <p>2 excuse me, their therapeutic uses. One of the</p> <p>3 problems associated with essential oils -- I've</p> <p>4 got something in my throat.</p> <p>5 One of the problems associated with</p> <p>6 essential oil is that essential oils need to be</p> <p>7 standardized. That indicates the fact that a</p> <p>8 standardized essential oil is derived from the</p> <p>9 same part of the plant. It's a seasonal variation</p> <p>10 component. Its chemistry may change, and there</p> <p>11 could be also some changes in its relative ratios</p> <p>12 to other components within that plant.</p> <p>13 So for that reason some of these</p> <p>14 products or some of these oils, like limonene, for</p> <p>15 example, can present itself as a very useful item</p> <p>16 in something like a hand sanitizer, but not</p> <p>17 necessarily a useful item when applied to the</p> <p>18 skin.</p> <p>19 When I read the Rolf patent, I took into</p> <p>20 consideration reports that I've reviewed or papers</p> <p>21 that have been written on the subject matter, I</p> <p>22 did not spell them out but just wanted to call the</p> <p>23 attention to anybody who would read my report to</p> <p>24 the fact that there is documented evidence for</p> <p>25 irritating properties.</p>
<p>186</p> <p>1 A. Correct.</p> <p>2 Q. And not all essential oils in all</p> <p>3 concentrations and in all amounts will be toxic</p> <p>4 either; right?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay. So in the second sentence here</p> <p>7 you refer to reports in the literature.</p> <p>8 A. Yes.</p> <p>9 Q. Do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. What literature are you referring to?</p> <p>12 MR. KREMEN: Where are you referring to?</p> <p>13 THE WITNESS: Second paragraph. Line 2,</p> <p>14 second paragraph.</p> <p>15 MR. KREMEN: Starting with "While the</p> <p>16 patent application suggests a mechanism"?</p> <p>17 THE WITNESS: No, above that.</p> <p>18 MR. KREMEN: Okay.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. So what literature are you referring to</p> <p>21 here?</p> <p>22 A. A number of -- I did not specify in this</p> <p>23 document the literature that I referred to on</p> <p>24 essential oil. Because in the natural products</p> <p>25 industry, essential oils are employed in a variety</p>	<p>188</p> <p>1 Q. Okay. My question was just a little bit</p> <p>2 more basic. The literature that you are referring</p> <p>3 to, it's not cited in your report; right?</p> <p>4 A. That's correct.</p> <p>5 Q. So we have no way of knowing what</p> <p>6 essential oils are being discussed under what</p> <p>7 context; right?</p> <p>8 A. That's correct.</p> <p>9 Q. Okay.</p> <p>10 A. That's correct.</p> <p>11 Q. And were these reports in the literature</p> <p>12 something that you reviewed in connection with</p> <p>13 forming your opinions, or are these just things</p> <p>14 that you remember reading over the course of your</p> <p>15 career?</p> <p>16 A. I think it's a combination of both.</p> <p>17 Q. Okay. So there are some literature</p> <p>18 references that you reviewed when performing -- or</p> <p>19 when forming your opinions and writing this report</p> <p>20 that are not actually identified here?</p> <p>21 A. That's correct. That's correct.</p> <p>22 Q. Okay. And I assume that those reports</p> <p>23 that you're referring to in the literature, those</p> <p>24 were to specific essential oils as opposed to</p> <p>25 general statements about all essential oils;</p>

October 24, 2022

<p>189</p> <p>1 right?</p> <p>2 A. Yes, that's correct. Because many</p> <p>3 essential oils are used in cosmetic agents, as</p> <p>4 well. And they're applied to the skin. So</p> <p>5 they're not irritating at the levels that they are</p> <p>6 recommended.</p> <p>7 Q. Yeah. And I would assume that if</p> <p>8 they're used in cosmetics, they would be applied</p> <p>9 to skin on the face --</p> <p>10 A. Yes.</p> <p>11 Q. -- near the nose?</p> <p>12 A. Yes, or wherever. But, yes, you're</p> <p>13 absolutely right. And if they're used in a soap,</p> <p>14 you're applying it all over the body.</p> <p>15 Q. Okay. Would you agree that whether a</p> <p>16 particular ingredient exhibits an electrostatic</p> <p>17 charge that's an inherent feature or property of</p> <p>18 that ingredient?</p> <p>19 A. Yes.</p> <p>20 Q. And the '802 patent claimed invention is</p> <p>21 relying on that inherent feature of those</p> <p>22 ingredients that have positive charges; correct?</p> <p>23 A. That's correct.</p> <p>24 Q. And you read the Rolf patent</p> <p>25 application; right?</p>	<p>191</p> <p>1 A. Yes.</p> <p>2 Q. Now, looking at -- let's skip ahead two</p> <p>3 pages to the last paragraph of your section on</p> <p>4 Rolf. So this would be page 12 of the PDF. Okay.</p> <p>5 So --</p> <p>6 MS. PETERSON: Can you go up a little</p> <p>7 bit? That's great.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. So you also offer the opinion that the</p> <p>10 patch described in Rolf would not function as</p> <p>11 described in that application; right?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. And so that would be your opinion</p> <p>14 that the Rolf patent application is not enabled?</p> <p>15 A. Yes, that's my conclusion. I felt that</p> <p>16 it wasn't really -- the way it's presented, that</p> <p>17 the claims really would not work as they're</p> <p>18 stated.</p> <p>19 Q. Okay. So your opinion is based on the</p> <p>20 conclusion that the claims of Rolf would not work?</p> <p>21 MR. KREMEN: Objection to form.</p> <p>22 THE WITNESS: The fact that he's using</p> <p>23 essential oils as the primary component, I just</p> <p>24 felt in my review of the patent that it really</p> <p>25 wasn't -- I didn't think of it as really a quality</p>
<p>190</p> <p>1 A. Yes, I did.</p> <p>2 Q. And you understand that Rolf explains</p> <p>3 that the formulations it discloses have biocidal</p> <p>4 properties; right?</p> <p>5 A. Yes. Yes, I have.</p> <p>6 Q. Yes, you understand that Rolf discloses</p> <p>7 that its formulations have biocidal properties?</p> <p>8 A. Yes, that's correct.</p> <p>9 Q. Okay. And those formulations disclosed</p> <p>10 in Rolf, Rolf explains that they can be used for</p> <p>11 the prevention of diseases associated with</p> <p>12 airborne pathogens and respiratory tract</p> <p>13 pathogens?</p> <p>14 A. Yes.</p> <p>15 MR. KREMEN: Objection to form.</p> <p>16 BY MS. PETERSON:</p> <p>17 Q. And it's also your understanding that</p> <p>18 Rolf explains that these airborne pathogens and</p> <p>19 respiratory tract pathogens are inactivated upon</p> <p>20 contact with the essential oil?</p> <p>21 A. Yes.</p> <p>22 Q. And you also understand that Rolf</p> <p>23 discloses the use of additional ingredients in its</p> <p>24 formulation, including antimicrobial agents such</p> <p>25 as benzalkonium chloride?</p>	<p>192</p> <p>1 scientific proposal in the patent.</p> <p>2 BY MS. PETERSON:</p> <p>3 Q. Okay.</p> <p>4 A. And so I kind of discredited the Rolf</p> <p>5 patent as a useful argument against the '802</p> <p>6 patent.</p> <p>7 Q. Okay. And so the basis for your</p> <p>8 opinion, then, is centered on the fact that it</p> <p>9 uses essential oils; is that right?</p> <p>10 MR. KREMEN: Objection to form.</p> <p>11 THE WITNESS: It's a questionable</p> <p>12 application and a questionable theory that's being</p> <p>13 presented. And some of the points of the</p> <p>14 essential oil, as I mentioned before, has to do</p> <p>15 with standardization of those oils. You may see</p> <p>16 it sometimes. You may not always. So I didn't</p> <p>17 feel that it provided adequate foundation.</p> <p>18 BY MS. PETERSON:</p> <p>19 Q. Do you dispute Rolf's point that</p> <p>20 essential oils can be used to inactivate airborne</p> <p>21 pathogens and respiratory tract pathogens?</p> <p>22 MR. KREMEN: Objection to the form.</p> <p>23 THE WITNESS: Only on the basis that</p> <p>24 it's cationic in nature. So it's providing a</p> <p>25 positive charge. There's no reference in Rolf to</p>

October 24, 2022

<p>193</p> <p>1 the whole concept of holding. There's no holding</p> <p>2 mentioned in Rolf. And that, as I go back to my</p> <p>3 previous statements, was an important aspect of</p> <p>4 the '802 patent.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. Okay. But you do agree that the</p> <p>7 essential oils in Rolf are cationic and therefore</p> <p>8 would exhibit an electrostatic charge; right?</p> <p>9 A. Yes.</p> <p>10 Q. And you testified earlier that that</p> <p>11 concept is related to the holding concept; right?</p> <p>12 MR. KREMEN: Objection.</p> <p>13 THE WITNESS: It is related, but there's</p> <p>14 more to that.</p> <p>15 BY MS. PETERSON:</p> <p>16 Q. Okay. Now, the adhesive -- the level of</p> <p>17 adhesion and the level of cohesion provided by a</p> <p>18 formulation, those would also be inherent</p> <p>19 properties of a particular formulation; right?</p> <p>20 A. Correct.</p> <p>21 Q. Okay.</p> <p>22 MR. KREMEN: Liane, are we still</p> <p>23 speaking about Rolf?</p> <p>24 MS. PETERSON: Yeah.</p> <p>25 MR. KREMEN: Okay.</p>	<p>195</p> <p>1 that you bring up for nonobviousness.</p> <p>2 Q. Okay. Let me -- I can break that down</p> <p>3 for you a little bit better.</p> <p>4 A. Yeah, it would be helpful.</p> <p>5 Q. Okay. So you say right here in the</p> <p>6 first sentence that, "I understand that commercial</p> <p>7 success of a patented product tends to show that</p> <p>8 the patented claims are not obvious provided that</p> <p>9 the commercial success is due solely to the</p> <p>10 patented claims."</p> <p>11 Do you see that?</p> <p>12 A. Right. Yes.</p> <p>13 Q. So is that the standard that you applied</p> <p>14 in your analysis?</p> <p>15 A. Right. In other words, what I was</p> <p>16 trying to say here, if in the '802 patent, if it</p> <p>17 doesn't do what they say it's doing, you won't</p> <p>18 have 7 million sales worldwide or whatever that</p> <p>19 number is domestically, et cetera. People would</p> <p>20 not be using the product. It doesn't work. So</p> <p>21 that contributes to the fact that it is a novel</p> <p>22 invention, because it's continuously being used</p> <p>23 and continues to be sold.</p> <p>24 Q. Now, you would agree that there could be</p> <p>25 non-patented features of a product that drive</p>
<p>194</p> <p>1 MS. PETERSON: We're discussing Rolf.</p> <p>2 MR. KREMEN: Okay.</p> <p>3 MS. PETERSON: But also generally asking</p> <p>4 to confirm his understanding of some of the points</p> <p>5 we've discussed.</p> <p>6 MR. KREMEN: Okay. I just wanted to</p> <p>7 make sure that we had some context.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. So, Dr. Lemmo, then is it correct to</p> <p>10 understand that you don't have any issue with Rolf</p> <p>11 using -- or applying the formulation through a</p> <p>12 device, like a patch?</p> <p>13 A. No, I have no objection to that.</p> <p>14 Q. Okay. The last section of your</p> <p>15 responsive report relates to commercial success.</p> <p>16 Do you see that heading, No. 4?</p> <p>17 A. Yes.</p> <p>18 Q. What standard did you use when</p> <p>19 determining whether Trutek's products demonstrate</p> <p>20 commercial success as being relevant to the</p> <p>21 question of nonobviousness?</p> <p>22 A. Well, I felt that commercial success was</p> <p>23 based upon the number of units that the product</p> <p>24 was -- that the product has been sold. I use</p> <p>25 that. I'm trying to understand the relationship</p>	<p>196</p> <p>1 demand for the product; right?</p> <p>2 A. Sure.</p> <p>3 Q. Did you consider whether any</p> <p>4 non-patented features of Trutek's products</p> <p>5 contributed to its sales?</p> <p>6 MR. KREMEN: Objection to form.</p> <p>7 THE WITNESS: I don't know what those</p> <p>8 might be.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. Okay. So that answer is no, I guess?</p> <p>11 A. If you could give me -- no, the reason</p> <p>12 why I say that is, you know, if you could give me</p> <p>13 an example of what you're referring to, I might be</p> <p>14 able to give you an opinion.</p> <p>15 Q. I don't have a specific example, I'm</p> <p>16 just asking you if you considered whether there is</p> <p>17 a possibility that non-patented features of</p> <p>18 Trutek's product could drive the demand for the</p> <p>19 product?</p> <p>20 A. It's possible.</p> <p>21 MR. KREMEN: Objection.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. And you did not consider that in your</p> <p>24 analysis; right?</p> <p>25 A. No.</p>

October 24, 2022

<p>197</p> <p>1 Q. Okay. Now, this statement in the first</p> <p>2 sentence of Section 4, where did you obtain that</p> <p>3 understanding from?</p> <p>4 A. I don't remember exactly that. As I</p> <p>5 said, my thought process for the concept -- the</p> <p>6 novel concept. I tried to tie that in with my</p> <p>7 understanding of what happens with products on the</p> <p>8 market. That was my thinking at the time that I</p> <p>9 wrote this.</p> <p>10 Q. Okay. Now, in the next sentence, you</p> <p>11 refer to, "Since the time the '802 patent was</p> <p>12 issued in 2012, approximately seven million units</p> <p>13 of the product based on this patent, have been</p> <p>14 sold in the United States and internationally."</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. What product are you referring to?</p> <p>18 A. I'm referring to the nasal ointment, the</p> <p>19 gel that was used.</p> <p>20 Q. So I'm sorry, is this NasalGuard?</p> <p>21 A. NasalGuard, yes.</p> <p>22 Q. Okay. And is it all iterations of</p> <p>23 NasalGuard or just one specific NasalGuard</p> <p>24 product?</p> <p>25 A. I had -- I generated that piece of</p>	<p>199</p> <p>1 A. As a result --</p> <p>2 Q. Okay. So repeat sales --</p> <p>3 A. I'm sorry, so repeat sales is a</p> <p>4 measure -- as I've been educated in the corporate</p> <p>5 setting, repeat sales of a unit is a measure of</p> <p>6 the product's success. And that's what keeps it</p> <p>7 novel.</p> <p>8 Q. Okay. So repeat sales is a factor that</p> <p>9 you considered with respect to commercial success;</p> <p>10 correct?</p> <p>11 A. Yes, that's correct.</p> <p>12 Q. And your understanding that repeat sales</p> <p>13 is relevant comes from your corporate experience?</p> <p>14 A. Yes, I relied on that in making my</p> <p>15 statements.</p> <p>16 Q. Okay.</p> <p>17 A. And in order to do that -- in order for</p> <p>18 me to do that, because I can't find that sales</p> <p>19 data or anything, I had to go back to Trutek and</p> <p>20 find out from them -- I had to find out from them,</p> <p>21 you know, what are you selling? How much do you</p> <p>22 sell? Do you sell 500 units in 12 years or</p> <p>23 whatever the period of time was? I have to get</p> <p>24 some sense of how successful this is.</p> <p>25 Q. Okay. And going back, you said that you</p>
<p>198</p> <p>1 information as a result of asking Mr. Wahi.</p> <p>2 Q. Okay. So Mr. Wahi provided you with</p> <p>3 information about how many units of a particular</p> <p>4 NasalGuard product had been sold in the United</p> <p>5 States?</p> <p>6 A. And internationally.</p> <p>7 MR. KREMEN: Objection.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. And do you know why -- or did you only</p> <p>10 ask for information on sales for that one specific</p> <p>11 product?</p> <p>12 MR. KREMEN: Objection.</p> <p>13 THE WITNESS: Yes.</p> <p>14 BY MS. PETERSON:</p> <p>15 Q. Why did you only ask for that one</p> <p>16 product?</p> <p>17 A. Because I wanted to just understand how</p> <p>18 much of the product is being sold. It was for my</p> <p>19 own knowledge that the product has repeat sales.</p> <p>20 In the document, I believe I go on to talk about</p> <p>21 repeat sales of a unit.</p> <p>22 Q. Okay.</p> <p>23 A. And that's how I was educated on</p> <p>24 commercial success of a product.</p> <p>25 Q. Okay.</p>	<p>200</p> <p>1 asked for information on one specific NasalGuard</p> <p>2 product because of the fact of these repeat sales;</p> <p>3 right?</p> <p>4 A. That's correct.</p> <p>5 MR. KREMEN: Objection to form.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. So does that mean that Trutek's other</p> <p>8 NasalGuard products don't have repeat sales?</p> <p>9 A. I don't know. I would assume that they</p> <p>10 do.</p> <p>11 Q. So how did you know that this particular</p> <p>12 NasalGuard product had repeat sales?</p> <p>13 A. I did not know that before I asked</p> <p>14 Mr. Wahi for the number of sales of the product he</p> <p>15 has.</p> <p>16 Q. So --</p> <p>17 A. I don't have sales data or marketing</p> <p>18 information at my fingerprints.</p> <p>19 Q. Okay. So Mr. Wahi provided you with the</p> <p>20 information about the one particular NasalGuard</p> <p>21 product that had repeat sales?</p> <p>22 MR. KREMEN: Objection.</p> <p>23 THE WITNESS: That was one that I asked</p> <p>24 about. I didn't ask about any other product.</p> <p>25</p>

October 24, 2022

<p>201</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. And going back to that again, why did</p> <p>3 you only ask about that one product?</p> <p>4 A. Because that's the product that I use.</p> <p>5 Q. Okay. So do you know anything about the</p> <p>6 sales of any of the other Trutek NasalGuard</p> <p>7 products?</p> <p>8 A. No, I don't.</p> <p>9 Q. So you have no idea if they're being</p> <p>10 sold at the same levels?</p> <p>11 A. I don't know.</p> <p>12 Q. But it is your understanding that all of</p> <p>13 the NasalGuard products have the same exact</p> <p>14 formulation, with the exception of the scented</p> <p>15 product which includes an additional ingredient</p> <p>16 providing that scent; that's correct?</p> <p>17 A. That's the way I understand it.</p> <p>18 MR. KREMEN: Objection.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Okay. Let's go to the next page.</p> <p>21 In the first paragraph, the second full</p> <p>22 sentence, you also explain that -- it looks like</p> <p>23 you're explaining another factor you considered,</p> <p>24 which is that, "Patent protection offers</p> <p>25 additional support for a product to be considered</p>	<p>203</p> <p>1 A. Yes.</p> <p>2 Q. But you're not sure whether those other</p> <p>3 Trutek patents that you reviewed cover the</p> <p>4 NasalGuard products?</p> <p>5 MR. KREMEN: That's not what he said.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Can you answer, please?</p> <p>8 A. Just repeat the question, I'm sorry.</p> <p>9 Q. Okay. You did look at Trutek's other</p> <p>10 patents; correct?</p> <p>11 A. Yes. Yes, I did.</p> <p>12 Q. Okay. And you said you focused</p> <p>13 primarily on the '802 patent?</p> <p>14 A. Correct. I looked at the '488 patent.</p> <p>15 I looked at the '481 patent.</p> <p>16 Q. And do those --</p> <p>17 A. Those are patents that I -- they</p> <p>18 focused -- one focused mostly on the method. The</p> <p>19 other one was on the formulation.</p> <p>20 Q. And are you talking about the claims of</p> <p>21 those patents --</p> <p>22 A. Yes.</p> <p>23 Q. -- or the disclosure of the patent?</p> <p>24 A. The claims.</p> <p>25 Q. And do the claims of the patent covering</p>
<p>202</p> <p>1 as a success," right?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So it's your opinion that part of</p> <p>4 the success of Trutek's NasalGuard product is the</p> <p>5 result of it having patent protection?</p> <p>6 A. Yes.</p> <p>7 Q. And when you refer to patent protection,</p> <p>8 I assume you're talking about all of Trutek's</p> <p>9 patents?</p> <p>10 A. Just the '802 patent.</p> <p>11 Q. You've reviewed Trutek's other patents;</p> <p>12 correct?</p> <p>13 A. Correct.</p> <p>14 Q. Do those other patents read on -- or do</p> <p>15 those other patents cover the Trutek products?</p> <p>16 A. I primarily focused on the '802 patent.</p> <p>17 Q. Okay. So you aren't sure one way or the</p> <p>18 other whether any of Trutek's other patents cover</p> <p>19 the Trutek NasalGuard products?</p> <p>20 MR. KREMEN: Objection.</p> <p>21 THE WITNESS: As I said previously, I</p> <p>22 focused primarily on the '802 patent.</p> <p>23 BY MS. PETERSON:</p> <p>24 Q. I mean, did you look at Trutek's other</p> <p>25 patents?</p>	<p>204</p> <p>1 the formulation, do those read on the Trutek</p> <p>2 NasalGuard product?</p> <p>3 A. It's been a while since I looked at it.</p> <p>4 I would have to go back and look at it again.</p> <p>5 Q. Okay. So as we're sitting here today,</p> <p>6 you're not the sure either way, whether the claims</p> <p>7 of the earlier Trutek formulation patent cover the</p> <p>8 NasalGuard product?</p> <p>9 MR. KREMEN: Objection.</p> <p>10 THE WITNESS: I would have to refresh my</p> <p>11 memory and reread.</p> <p>12 BY MS. PETERSON:</p> <p>13 Q. Okay. Do you know when NasalGuard was</p> <p>14 first offered for sale in the United States?</p> <p>15 A. I believe that was the 2012. It's</p> <p>16 possible, but I'm not certain. I do post a year.</p> <p>17 Q. And when you obtained this information</p> <p>18 from Mr. Wahi, did he just give you the</p> <p>19 number 7 million units, or did he give you, like,</p> <p>20 sales records for that product?</p> <p>21 A. No sales records, no.</p> <p>22 Q. So he --</p> <p>23 A. He just gave me -- he just mentioned it</p> <p>24 to me.</p> <p>25 Q. Okay. So you had a conversation with</p>

October 24, 2022

<p>205</p> <p>1 Mr. Wahi, and he told you that the particular</p> <p>2 NasalGuard product that you use has sold 7 million</p> <p>3 units sales since 2012?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. In that same sentence we were</p> <p>6 just looking at, you also say that because the</p> <p>7 Trutek products "have been marketed successfully</p> <p>8 for ten years, this product line stands tall among</p> <p>9 products in this category."</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. And here, now it looks like you're</p> <p>13 talking about the entire Trutek NasalGuard product</p> <p>14 line?</p> <p>15 A. Probably. As I said, to my knowledge,</p> <p>16 there is an unscented version and a scented</p> <p>17 version. And that's what I'm referring to.</p> <p>18 Q. Okay. So you would agree then that the</p> <p>19 sales of the Trutek NasalGuard products are due at</p> <p>20 least in part to their marketing efforts?</p> <p>21 MR. KREMEN: Objection.</p> <p>22 THE WITNESS: The sales are essentially</p> <p>23 based on the use by the consumer. So regardless</p> <p>24 of what their marketing efforts may be, even if</p> <p>25 they don't do anything -- and they don't really.</p>	<p>207</p> <p>1 THE WITNESS: That is one good example.</p> <p>2 I could tell you from personal experience products</p> <p>3 that I've developed sell sometimes better in a</p> <p>4 foreign country because of the nature of the</p> <p>5 product as opposed to domestically.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Okay. So the next sentence says that,</p> <p>8 "The product has a domestic and international</p> <p>9 presence which demonstrates that it has been</p> <p>10 reviewed for human use without prescription for</p> <p>11 the claimed properties established in the patent."</p> <p>12 A. Yes.</p> <p>13 Q. Can you explain what you mean by that?</p> <p>14 A. Okay. When a product is placed on the</p> <p>15 market domestically and you make claims for the</p> <p>16 product, the claims have to be substantiated and</p> <p>17 usually submitted to one of the regulatory bodies.</p> <p>18 Within a corporation, you have an internal</p> <p>19 regulatory body who reviews the product and</p> <p>20 reviews the claims that you're making about the</p> <p>21 product and affirms the fact that what you're</p> <p>22 saying about the product will, in fact, do what</p> <p>23 you state on your labeling.</p> <p>24 Q. Okay. So those are all related to</p> <p>25 statements made in the labeling for a product or</p>
<p>206</p> <p>1 I don't see much advertising for the product, to</p> <p>2 be honest. But the sales of the product are</p> <p>3 really based upon, as I said before, repeat sales.</p> <p>4 If I buy the product, I buy a tube of the product,</p> <p>5 and I find that I'm -- I like the use of the</p> <p>6 product and I feel comfortable using the product,</p> <p>7 I would go out and buy it again.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. When did you first start using</p> <p>10 NasalGuard?</p> <p>11 A. The first time that I used it was when</p> <p>12 we had discussion related to Matrixx Initiatives.</p> <p>13 Q. So you were not using NasalGuard prior</p> <p>14 to being contacted by Trutek.</p> <p>15 A. I had no idea of the product.</p> <p>16 Q. Would you also agree that the sales of a</p> <p>17 product can depend, at least in part, on where</p> <p>18 those products are being sold?</p> <p>19 A. Yes.</p> <p>20 Q. So certainly, like, a sale on Amazon</p> <p>21 where consumers can identify the product by</p> <p>22 searching, you know, that would be easier for a</p> <p>23 consumer to purchase than if it was only available</p> <p>24 through a distributor?</p> <p>25 MR. KREMEN: Objection.</p>	<p>208</p> <p>1 in the advertisement for a product; correct?</p> <p>2 A. Correct. And it relates primarily to</p> <p>3 the regulatory affairs department.</p> <p>4 Q. Okay. So you're not suggesting here</p> <p>5 that the FDA reviewed information to confirm that</p> <p>6 NasalGuard practices each and every element of the</p> <p>7 '802 patent claims; right?</p> <p>8 MR. KREMEN: Objection.</p> <p>9 THE WITNESS: No, I'm not saying that.</p> <p>10 BY MS. PETERSON:</p> <p>11 Q. Okay. So, rather, you're talking about</p> <p>12 the product being reviewed to substantiate claims</p> <p>13 that Trutek makes in its website or product</p> <p>14 packaging or product labeling to make sure that</p> <p>15 they're accurate?</p> <p>16 A. If a product is on the market and in</p> <p>17 violation of the FDA, you would receive an FDA</p> <p>18 letter, a warning letter, that your product is</p> <p>19 either misbranded or mislabeled. And to my</p> <p>20 knowledge, that doesn't exist. Otherwise, that</p> <p>21 product would be off the market at this point. No</p> <p>22 retailer would carry that product.</p> <p>23 Q. Sure. Okay.</p> <p>24 Now, at the bottom of this page, you</p> <p>25 talk a little bit how the Trutek NasalGuard</p>

October 24, 2022

<p style="text-align: right;">209</p> <p>1 products operate.</p> <p>2 A. The page has to be raised. I'm not</p> <p>3 seeing --</p> <p>4 MS. PETERSON: Yeah, can you scroll down</p> <p>5 a little bit. I'm looking at the last full</p> <p>6 paragraph. The last paragraph, so starting with</p> <p>7 "The commercial" -- there we go.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. Okay. So you talk about how "The '802</p> <p>10 patent claims a product that electrostatically</p> <p>11 inhibits harmful airborne particles from infecting</p> <p>12 an individual."</p> <p>13 And then you go on to say, "This product</p> <p>14 effectively prevents that from happening by</p> <p>15 creating a positive electrostatic charge that</p> <p>16 attracts the particles and holds the particles in</p> <p>17 place until a biocide can inactivate them and</p> <p>18 render them harmless"; correct?</p> <p>19 A. That's correct.</p> <p>20 Q. So that's your understanding of how</p> <p>21 NasalGuard operates.</p> <p>22 A. That's my understanding of the</p> <p>23 mechanism, yes.</p> <p>24 Q. Okay. So that electrostatic charge both</p> <p>25 attracts the particles and holds the particles in</p>	<p style="text-align: right;">211</p> <p>1 A. I did not conduct any of that, no.</p> <p>2 Q. Okay. But you did rely on some testing</p> <p>3 of NasalGuard conducted by Dr. Burns and --</p> <p>4 Mr. Burns and Dr. Ermakov; correct?</p> <p>5 A. Yes, that's correct.</p> <p>6 Q. Okay. And that of course was the</p> <p>7 testing with respect to the conductivity or the</p> <p>8 electrostatic charge of the formulation?</p> <p>9 A. The electrostatic charge, not the</p> <p>10 conductivity.</p> <p>11 Q. Well, they were testing -- you don't</p> <p>12 disagree that they were testing the conductivity;</p> <p>13 right?</p> <p>14 A. They were not testing conductivity.</p> <p>15 They were testing electrostatic charge.</p> <p>16 Q. Well, no.</p> <p>17 A. Conductivity --</p> <p>18 Q. That's what they ultimately reported.</p> <p>19 A. Conductivity --</p> <p>20 Q. But they were actually --</p> <p>21 A. No.</p> <p>22 Q. -- measuring --</p> <p>23 A. No. My understanding of conductivity is</p> <p>24 the placement of the electrode into the solution.</p> <p>25 The electrode -- and that's one of the reasons why</p>
<p style="text-align: right;">210</p> <p>1 place; correct?</p> <p>2 MR. KREMEN: Objection.</p> <p>3 THE WITNESS: I think I reiterated the</p> <p>4 fact that the holding, that cohesive nature, was</p> <p>5 aside from, that related primarily to that</p> <p>6 impermeability that was related. There were other</p> <p>7 ingredients.</p> <p>8 BY MS. PETERSON:</p> <p>9 Q. But here you're saying that the</p> <p>10 electrostatic charge attracts the particles and</p> <p>11 holds the particles in place; correct?</p> <p>12 A. Yes. Yes.</p> <p>13 Q. Okay.</p> <p>14 A. But there are other components to the</p> <p>15 product.</p> <p>16 Q. Okay.</p> <p>17 A. For the holding function.</p> <p>18 Q. But certainly the electrostatic charge,</p> <p>19 in your opinion, here with respect to NasalGuard</p> <p>20 performs both of those functions?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Now, you did not do a</p> <p>23 claim-by-claim analysis of whether the Trutek</p> <p>24 NasalGuard products practice each and every</p> <p>25 element of the '802 patent claims; correct?</p>	<p style="text-align: right;">212</p> <p>1 I wanted to witness this, to go there and see what</p> <p>2 they did.</p> <p>3 Q. Okay. Regardless, the testing that you</p> <p>4 relied on with respect to whether Trutek products</p> <p>5 practice the '802 patent claims, that would be the</p> <p>6 Burns and Ermakov testing about the surface</p> <p>7 electrostatic charge of the products; correct?</p> <p>8 A. That's correct.</p> <p>9 Q. Okay. And that's the information that</p> <p>10 you relied on in forming your opinion that the</p> <p>11 commercial success of NasalGuard is due to the</p> <p>12 claimed invention?</p> <p>13 MR. KREMEN: Jeez, objection to form.</p> <p>14 THE WITNESS: There's a -- the testing</p> <p>15 demonstrates the fact that there is an</p> <p>16 electrostatic charge. So the claim that the</p> <p>17 mechanism utilizing the electrostatic charge is</p> <p>18 substantiated by the work of Dr. Ermakov as well</p> <p>19 as Mr. Burns in separate studies using either a</p> <p>20 piece of paper or a physiologically useful agent,</p> <p>21 namely, the pigskin that was done by Mr. Burns.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. Okay. And you didn't do any other</p> <p>24 testing of the level of adhesion or cohesion</p> <p>25 provided by the NasalGuard formulation?</p>

October 24, 2022

<p>213</p> <p>1 A. Me personally, no.</p> <p>2 Q. And you're not aware of anybody else</p> <p>3 conducting that testing; correct?</p> <p>4 A. I'm not aware of it, that's correct.</p> <p>5 Q. And you didn't rely on it; right?</p> <p>6 A. I would have mentioned it.</p> <p>7 Q. And, similarly, you didn't rely on any</p> <p>8 testing or -- you did not rely on any testing of</p> <p>9 the level of permeability of any thin film formed</p> <p>10 by NasalGuard upon application of the product?</p> <p>11 A. No, I did not.</p> <p>12 Q. Okay.</p> <p>13 MS. PETERSON: Last page, can we turn</p> <p>14 one more page forward.</p> <p>15 BY MS. PETERSON:</p> <p>16 Q. You also conclude here that, "The patent</p> <p>17 number of the '802 patent is clearly marked for</p> <p>18 every unit sold in the United States."</p> <p>19 Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. And what's the basis for that assertion?</p> <p>22 A. That's for patent protection but that</p> <p>23 the person -- again, if a person tries to market a</p> <p>24 similar product without that patent number, that</p> <p>25 could be a violation, in my opinion.</p>	<p>215</p> <p>1 started using the product in 2020. It was in and</p> <p>2 around the time that we started learning more</p> <p>3 about coronavirus, and I was looking for ways that</p> <p>4 I can protect myself in addition to wearing the</p> <p>5 mask and being vaccinated.</p> <p>6 Q. Okay. So you did not use NasalGuard</p> <p>7 prior to 2020; right?</p> <p>8 A. I wasn't familiar with the product, as I</p> <p>9 stated earlier.</p> <p>10 Q. Okay. So you don't know for certain</p> <p>11 whether the '802 patent was marked on NasalGuard</p> <p>12 products that were sold prior to 2020; right?</p> <p>13 A. No, I don't know that.</p> <p>14 Q. Okay.</p> <p>15 MS. PETERSON: We can take that exhibit</p> <p>16 down.</p> <p>17 BY MS. PETERSON:</p> <p>18 Q. I'd like to take a look at your -- let's</p> <p>19 mark another exhibit. This is a list of materials</p> <p>20 that you reviewed that was attached to your</p> <p>21 opening report.</p> <p>22 MS. PETERSON: Jennifer, I think it's</p> <p>23 item No. 7. It says "Lemmo Materials Reviewed."</p> <p>24 We'll mark this as Exhibit 17.</p> <p>25 (Lemmo Deposition Exhibit 18 was marked</p>
<p>214</p> <p>1 Q. Okay. Yeah, no, my question was just</p> <p>2 how do you know that the patent number of the '802</p> <p>3 patent is clearly marked for every unit sold in</p> <p>4 the United States?</p> <p>5 A. Oh, because I use the product.</p> <p>6 Q. Okay. So you looked at one of your</p> <p>7 products, and you saw the patent number listed?</p> <p>8 A. Yeah. And, you know, it would be</p> <p>9 unusual for me to get a product that has a serial</p> <p>10 number and someone else get it without. That's</p> <p>11 just part of quality control and quality assurance</p> <p>12 in the manufacturing sector of a business.</p> <p>13 Q. And it's your understanding that there</p> <p>14 could be potential liability if a company does not</p> <p>15 include a patent marking on its product?</p> <p>16 MR. KREMEN: Objection to form.</p> <p>17 THE WITNESS: It's not so much</p> <p>18 liability. It's more so protection of your</p> <p>19 product that it is patented.</p> <p>20 BY MS. PETERSON:</p> <p>21 Q. Now, you only --</p> <p>22 A. Because if it --</p> <p>23 Q. -- started using NasalGuard in 2020 --</p> <p>24 A. Probably it was early 2020. I had some</p> <p>25 serious illness in 2019, and as a result, I</p>	<p>216</p> <p>1 for identification and attached to the</p> <p>2 transcript.)</p> <p>3 MR. KREMEN: 18. 17 was --</p> <p>4 MS. PETERSON: Oh, yes, 18. Thank you.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. Okay. Dr. Lemmo, do you recognize</p> <p>7 Exhibit 18?</p> <p>8 A. Yes.</p> <p>9 Q. And this is a list of materials that you</p> <p>10 reviewed that you prepared and attached to your</p> <p>11 opening report; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. Other than the materials listed</p> <p>14 here on Exhibit 18, did you review anything else</p> <p>15 in forming your opinions stated in your opening</p> <p>16 report?</p> <p>17 A. Only the ones that are listed here.</p> <p>18 Q. Okay. Did you identify personally each</p> <p>19 of these -- well, never mind. Strike that.</p> <p>20 Okay. Item No. 6 refers to "Information</p> <p>21 on the NanoBio Protect product packaging."</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. And that would be your own personal</p> <p>25 copies of the product packaging that you had in</p>

October 24, 2022

<p style="text-align: right;">217</p> <p>1 your possession?</p> <p>2 A. Whatever I was able to obtain on the</p> <p>3 website for NanoBio.</p> <p>4 Q. Okay. Item No. 5, copies of the portion</p> <p>5 of the BlueWillow website.</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Did you identify those sections of the</p> <p>9 website yourself personally, or were you provided</p> <p>10 them or directed to them by counsel?</p> <p>11 A. When I was retained by Mr. Wahi and he</p> <p>12 told me a little bit about the case, routinely in</p> <p>13 order to familiarize myself, I'll do a quick</p> <p>14 search in the literature to what I could find out</p> <p>15 about the company. BlueWillow was not a company</p> <p>16 that I was familiar with before Mr. Wahi had</p> <p>17 contacted me at that time.</p> <p>18 Q. And I assume that means you weren't</p> <p>19 familiar with the NanoBio Protect product either?</p> <p>20 A. Not at all.</p> <p>21 Q. Never came across it?</p> <p>22 A. Not at all.</p> <p>23 Q. Okay. And, actually, I just realized I</p> <p>24 mischaracterized something in that list. Item</p> <p>25 No. 6, I can't remember if I said that that was</p>	<p style="text-align: right;">219</p> <p>1 be it to Mr. Kremen or Mr. Wahi or any other</p> <p>2 clients that I may have in the past or in the</p> <p>3 hopefully future, you know, I provide them with</p> <p>4 background information that I find. I'll do a</p> <p>5 patent search.</p> <p>6 Q. Okay. So is it your recollection that</p> <p>7 these patents are directed to different</p> <p>8 oil-in-water emulsions?</p> <p>9 A. It's possible that that's the case.</p> <p>10 Offhand, I don't have -- I apologize for not</p> <p>11 listing the patent number and the descriptor on</p> <p>12 this as a list. But I do have those files.</p> <p>13 Q. But they were identified by you and</p> <p>14 reviewed by you for background purposes?</p> <p>15 A. Yes, that's correct.</p> <p>16 Q. To further inform you about the products</p> <p>17 at issue in the case?</p> <p>18 A. Yes. Just to familiarize myself with</p> <p>19 what was going on. It's very difficult,</p> <p>20 especially when you're looking at a product that</p> <p>21 you have no knowledge of and claims that are being</p> <p>22 made, especially for the NanoBio product and what</p> <p>23 NanoBio was attempting to do with their</p> <p>24 products -- or rather -- I'm sorry, rather what</p> <p>25 BlueWillow was attempting to do with their</p>
<p style="text-align: right;">218</p> <p>1 NasalGuard product packaging or NanoBio Protect</p> <p>2 product packaged. So let me ask you again.</p> <p>3 This NanoBio Protect product packaging</p> <p>4 that you're referring to, is that something you</p> <p>5 purchased, or was it provided to you?</p> <p>6 A. No, it was what I found on the Internet.</p> <p>7 Q. Okay.</p> <p>8 A. Any image -- what I generally do is I'll</p> <p>9 search for images of the product, and I'll try to</p> <p>10 zoom in on the content -- the label content,</p> <p>11 information that's posted on the label.</p> <p>12 Q. Okay.</p> <p>13 A. But I never had physically the label in</p> <p>14 my hands.</p> <p>15 Q. Okay. Items No. 7 and 8 contain a list</p> <p>16 of patents in a published patent application.</p> <p>17 Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. Why did you review those?</p> <p>20 A. They were probably to give me foundation</p> <p>21 information so that I can evaluate -- I'd have to</p> <p>22 go back and look at my files -- so that I could</p> <p>23 evaluate and give a response to the plaintiff as</p> <p>24 far as what I reviewed. Before I can make a</p> <p>25 judgment on a thing or give advice to a company,</p>	<p style="text-align: right;">220</p> <p>1 products, including the NanoBio Protect product,</p> <p>2 so that I get a clearer picture of what the</p> <p>3 entity, what this business was all about.</p> <p>4 Q. Okay. And then to the best of your</p> <p>5 recollection, there wasn't anything specific</p> <p>6 within any of these patents that you specifically</p> <p>7 relied on and mentioned in your report; correct?</p> <p>8 MR. KREMEN: Objection.</p> <p>9 THE WITNESS: Not to my knowledge. I</p> <p>10 cannot spell it out at this point. Because,</p> <p>11 again, I need to see what the title of the patent</p> <p>12 was to clarify it. At this point, looking at</p> <p>13 patent numbers is kind of like looking at a</p> <p>14 foreign language for me.</p> <p>15 BY MS. PETERSON:</p> <p>16 Q. Sure. Okay. And then the rest of the</p> <p>17 items on your list, it's a number of publications;</p> <p>18 correct?</p> <p>19 A. That's correct.</p> <p>20 Q. And what was the purpose for reviewing</p> <p>21 these?</p> <p>22 A. Again, to familiarize myself more so</p> <p>23 with what nanoemulsions are as well as what</p> <p>24 nanotechnology involved. Having done the research</p> <p>25 in terms of what BlueWillow was doing as research,</p>

October 24, 2022

<p style="text-align: right;">221</p> <p>1 not necessarily for the commercial aspect but the</p> <p>2 research work that they were doing, to better</p> <p>3 familiarize myself so that I can express myself</p> <p>4 relative to what the nanotechnology and</p> <p>5 microemulsions in their applications really meant.</p> <p>6 Q. Okay. And these patents and</p> <p>7 publications, these are general materials relating</p> <p>8 to nanoemulsion, not necessarily directed to</p> <p>9 specific research being conducted by BlueWillow;</p> <p>10 right?</p> <p>11 A. Yes, that's correct.</p> <p>12 Q. Okay.</p> <p>13 A. It was for my own edification so that I</p> <p>14 would be able to speak about it.</p> <p>15 Q. Okay.</p> <p>16 MS. PETERSON: We can take that down.</p> <p>17 MR. KREMEN: Would it be a good time for</p> <p>18 a break right now?</p> <p>19 MS. PETERSON: Sure. We can go off the</p> <p>20 record.</p> <p>21 THE VIDEOGRAPHER: We're going off the</p> <p>22 record. The time is now 4:12 p.m.</p> <p>23 (Recess from the record.)</p> <p>24 THE VIDEOGRAPHER: We're back on the</p> <p>25 record. The time is now 4:24 p.m.</p>	<p style="text-align: right;">223</p> <p>1 Q. Okay. So at the bottom of this</p> <p>2 paragraph, you have a sentence that's underlined</p> <p>3 where you state that, "By their very nature,</p> <p>4 nanoemulsion droplets exhibit an electrostatic</p> <p>5 charge which causes them to repel one-another" --</p> <p>6 A. Yes.</p> <p>7 Q. -- correct?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. So when a nanoemulsion is applied</p> <p>10 to the skin, it exists as individual droplets?</p> <p>11 A. Yes.</p> <p>12 Q. And then after application to the skin,</p> <p>13 they remain as separate droplets on the skin --</p> <p>14 A. Right.</p> <p>15 Q. -- as a result of that electrostatic</p> <p>16 charge; right?</p> <p>17 A. Right. I believe that's the way it is.</p> <p>18 And they would coalescent to a single liquid mass</p> <p>19 if they were not electrostatically charged.</p> <p>20 Q. So, in other words, when applied to the</p> <p>21 skin, they don't form a continuous layer on the</p> <p>22 skin. They still exist as droplets?</p> <p>23 A. That is my understanding of how the</p> <p>24 technology works. Because you have positive and</p> <p>25 negative charge built into the structure of the</p>
<p style="text-align: right;">222</p> <p>1 MS. PETERSON: Okay. Let's pull up</p> <p>2 Exhibit 13, which is Dr. Lemmo's opening expert</p> <p>3 report.</p> <p>4 THE REMOTE TECHNICIAN: Stand by.</p> <p>5 MS. PETERSON: And this one at least has</p> <p>6 legible page numbers. So hopefully that will help</p> <p>7 out. But if we could turn to page 8 of the</p> <p>8 report, which is page 11 of the PDF.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. Okay. So at the top of this page,</p> <p>11 Section 3, Dr. Lemmo, you included an explanation</p> <p>12 of nanoemulsion technology, correct?</p> <p>13 A. That's correct.</p> <p>14 Q. Why did you include this?</p> <p>15 A. I wanted to reiterate what I said</p> <p>16 earlier about those references in that I read -- I</p> <p>17 read references about the nanoemulsion process,</p> <p>18 the technology, acting as an interesting delivery</p> <p>19 system as opposed to a person who was just -- had</p> <p>20 not pretty much done their homework in reviewing</p> <p>21 the material. So it was essentially to get a</p> <p>22 foundation started.</p> <p>23 Q. Okay. And you understand that NanoBio</p> <p>24 Protect is a nanoemulsion product?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">224</p> <p>1 nanoemulsion.</p> <p>2 Q. Okay. Now, you -- we touched on this</p> <p>3 briefly, but you also relied on reports prepared</p> <p>4 by Dr. Ermakov and Mr. Burns about some testing</p> <p>5 that they did --</p> <p>6 A. Yes.</p> <p>7 Q. -- in forming your opinions as stated in</p> <p>8 your opening report; correct?</p> <p>9 A. Yes, that's correct.</p> <p>10 Q. Okay. So on page 9 --</p> <p>11 MS. PETERSON: If we can turn to that,</p> <p>12 please.</p> <p>13 If you go down a little bit farther.</p> <p>14 Okay. The paragraph that starts on January 11th.</p> <p>15 BY MS. PETERSON:</p> <p>16 Q. About halfway through that paragraph,</p> <p>17 you state, "I reviewed this report" -- and here</p> <p>18 we're referring to Dr. Ermakov -- "and found</p> <p>19 Dr. Ermakov's methodology and conclusions to be</p> <p>20 sound."</p> <p>21 A. Yes, that's correct.</p> <p>22 Q. That's your position?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And then on the next page, you</p> <p>25 make the same statement regarding Mr. Burns, as</p>

October 24, 2022

<p style="text-align: right;">225</p> <p>1 well; correct?</p> <p>2 A. That's correct.</p> <p>3 Q. So you also found Mr. Burns' methodology</p> <p>4 and conclusions to be sound --</p> <p>5 A. Yes.</p> <p>6 Q. -- based on what you reviewed in his</p> <p>7 report?</p> <p>8 A. Based on his report, yes. As well as</p> <p>9 Dr. Ermakov's report.</p> <p>10 Q. Okay. And I think we established this</p> <p>11 earlier, but you did not have any meetings or</p> <p>12 discussions with Mr. Burns or Dr. Ermakov prior to</p> <p>13 preparing your report; right?</p> <p>14 A. That's correct. I relied solely on the</p> <p>15 written report.</p> <p>16 Q. Okay. So I assume, then, also that you</p> <p>17 did not participate or make the decision to have</p> <p>18 Dr. Ermakov and Mr. Burns conduct the testing?</p> <p>19 A. I had no involvement in those decisions.</p> <p>20 Q. And I also assume you did not identify</p> <p>21 Dr. Ermakov or Mr. Burns as candidates to oversee</p> <p>22 and design that testing?</p> <p>23 A. That's correct. I did not know either</p> <p>24 one of them.</p> <p>25 Q. Okay. You anticipated my next question.</p>	<p style="text-align: right;">227</p> <p>1 Dr. Ermakov or Mr. Burns include a CV; correct?</p> <p>2 A. That's correct.</p> <p>3 Q. Did you -- have you reviewed or -- did</p> <p>4 you review any résumés or CV for Mr. Burns or</p> <p>5 Dr. Ermakov --</p> <p>6 A. No, I have --</p> <p>7 Q. -- prior to preparing your report?</p> <p>8 A. No, I never checked on their academic</p> <p>9 credentials or their employment status.</p> <p>10 Q. So you didn't do anything to investigate</p> <p>11 their qualifications before relying on their</p> <p>12 testing?</p> <p>13 A. No, I did not.</p> <p>14 Q. I assume you also did not have any role</p> <p>15 or participate in designing the test methods used</p> <p>16 by Dr. Ermakov and Mr. Burns?</p> <p>17 A. I had no involvement.</p> <p>18 Q. Did you review those test methods or</p> <p>19 protocols prior to them performing the</p> <p>20 experiments?</p> <p>21 A. No.</p> <p>22 Q. And no role in designing the conditions</p> <p>23 under which the testing occurred?</p> <p>24 A. I'm sorry, I missed the beginning of</p> <p>25 your statement. Can you just repeat that for me?</p>
<p style="text-align: right;">226</p> <p>1 So you never worked with either one before?</p> <p>2 A. Neither one.</p> <p>3 Q. Okay. Not aware of either of them prior</p> <p>4 to reviewing their reports?</p> <p>5 A. Not at all.</p> <p>6 MR. KREMEN: Um -- okay. Go ahead.</p> <p>7 THE WITNESS: Perhaps -- you know, the</p> <p>8 only thing that I can say is if they were part of</p> <p>9 the discussion related to the case against</p> <p>10 Matrixx Initiatives, it's possible that I read</p> <p>11 reports if that was employed. But at this point</p> <p>12 I'm not certain. So I can't commit to that.</p> <p>13 BY MS. PETERSON:</p> <p>14 Q. So if you were aware of them prior to</p> <p>15 preparing this opening report, it would have been</p> <p>16 in connection with them preparing reports of a</p> <p>17 similar nature for use in the Matrixx?</p> <p>18 A. That's correct. Yes, that's correct.</p> <p>19 But I did not know either one of them. They are</p> <p>20 complete strangers to me.</p> <p>21 Q. So you were not aware of either of them</p> <p>22 outside of the work on your matter involving</p> <p>23 Blue Willow or Matrixx?</p> <p>24 A. That's correct.</p> <p>25 Q. Okay. Now, neither of the reports by</p>	<p style="text-align: right;">228</p> <p>1 Q. You didn't have any role or participate</p> <p>2 in designing the conditions under which the</p> <p>3 testing occurred?</p> <p>4 A. Oh, no, I had absolutely no involvement</p> <p>5 with either one of them.</p> <p>6 Q. Did you have any role or participate in</p> <p>7 the decision to decide that the products should be</p> <p>8 tested on paper and on dried pigskin?</p> <p>9 A. No, not at all.</p> <p>10 Q. And did you have any role or participate</p> <p>11 in any discussions about what equipment should be</p> <p>12 used in the testing?</p> <p>13 A. No, no involvement.</p> <p>14 Q. It is your understanding that Mr. Burns</p> <p>15 and Dr. Ermakov used different equipment; correct?</p> <p>16 A. Yes.</p> <p>17 Q. Do you know why that is?</p> <p>18 A. I would -- again, this is an assumption</p> <p>19 on my part, it's just the manner in which they</p> <p>20 conduct their tests in their independent</p> <p>21 laboratories. So how Dr. Ermakov did his testing</p> <p>22 for surface charge versus how Mr. Burns did his</p> <p>23 testing using the equipment for the measurements,</p> <p>24 I had no knowledge of that except for what I read</p> <p>25 in these reports.</p>

October 24, 2022

<p>229</p> <p>1 Q. Okay. So looking then at these</p> <p>2 statements in -- on pages 9 and 10 of your report,</p> <p>3 what did you base your conclusion that their</p> <p>4 methodology was sound?</p> <p>5 A. Just on what I read. I assumed that</p> <p>6 their methodology -- one being in a respected</p> <p>7 university of which I'm a graduate, I'm assuming</p> <p>8 that he would utilize methodology that would be</p> <p>9 sound. Mr. Burns worked for -- I believe it's a</p> <p>10 private laboratory, outside laboratory. In my</p> <p>11 past experience, I've used outside laboratories</p> <p>12 for analytical purposes, and I assume that they</p> <p>13 have the necessary credentialing and</p> <p>14 certifications that are afforded to these</p> <p>15 laboratories to be responsible with the results</p> <p>16 that they provide.</p> <p>17 Q. Okay. So, in other words, to confirm</p> <p>18 that their methodology was sound, you relied on</p> <p>19 what they contained in their -- of what they</p> <p>20 provided in their reports?</p> <p>21 A. Yes, that's correct.</p> <p>22 Q. And you didn't do any other independent</p> <p>23 investigation to assess the accuracy of the</p> <p>24 methodology other than what was written in the</p> <p>25 reports?</p>	<p>231</p> <p>1 A. I don't know the answer to that, but I</p> <p>2 would assume that they do that routinely only</p> <p>3 because of what I witnessed their facilities.</p> <p>4 Q. And that's something that you learned</p> <p>5 after preparing your report.</p> <p>6 A. That's correct.</p> <p>7 Q. Okay. How did you determine that the</p> <p>8 appropriate equipment was used by Mr. Burns and</p> <p>9 Dr. Ermakov at the time that you prepared your</p> <p>10 opening and reply reports on infringement?</p> <p>11 A. I relied exclusively on what they wrote.</p> <p>12 Q. Okay.</p> <p>13 A. So I just -- I pretty much just use that</p> <p>14 as reference that what they were stating was</p> <p>15 factual.</p> <p>16 Q. Okay. Bear with me for one second.</p> <p>17 A. Sure.</p> <p>18 Q. Do you know when -- okay. So both</p> <p>19 Mr. Burns and Dr. Ermakov, they both tested Trutek</p> <p>20 samples as well BlueWillow NanoBio Protect</p> <p>21 samples; correct?</p> <p>22 A. That's correct.</p> <p>23 Q. Do you know when those samples were</p> <p>24 manufactured?</p> <p>25 A. I don't know.</p>
<p>230</p> <p>1 A. No, I didn't think that it was necessary</p> <p>2 for me to do so. I took it at face value that it</p> <p>3 was reliable.</p> <p>4 Q. And I don't have the name of his</p> <p>5 laboratory, but the laboratory that Dr. Burns --</p> <p>6 Mr. Burns is associated with, have you ever worked</p> <p>7 with --</p> <p>8 A. ETS. ETS.</p> <p>9 Q. ETS. Thank you.</p> <p>10 A. Yes.</p> <p>11 Q. Have you ever worked with ETS</p> <p>12 previously?</p> <p>13 A. No, not at all.</p> <p>14 Q. Had you ever heard of ETS?</p> <p>15 A. No.</p> <p>16 Q. Do you know what type of testing ETS is</p> <p>17 typically engaged in?</p> <p>18 A. I never investigated it in great detail.</p> <p>19 Q. Do you know how often Mr. Burns or</p> <p>20 Dr. Ermakov performed tests of the nature</p> <p>21 described in their reports?</p> <p>22 A. I did not inquire on that, no.</p> <p>23 Q. Do you know if Dr. Burns or -- Mr. Burns</p> <p>24 or Dr. Ermakov typically conduct this type of</p> <p>25 testing in the normal course of business?</p>	<p>232</p> <p>1 Q. Do you know what their expiration date</p> <p>2 was?</p> <p>3 A. I don't know.</p> <p>4 Q. Do you know what lot numbers the samples</p> <p>5 were that were tested?</p> <p>6 A. I don't think that they were reported in</p> <p>7 the body of the reports. They may have had</p> <p>8 coding, but I offhand at this point can't recall.</p> <p>9 THE WITNESS: Bless you.</p> <p>10 MR. KREMEN: Thank you.</p> <p>11 BY MS. PETERSON:</p> <p>12 Q. So you don't know if the products -- if</p> <p>13 they were expired or not at the time of testing?</p> <p>14 A. I assumed that they were not, but I</p> <p>15 don't know that.</p> <p>16 Q. Okay. Did Mr. Burns run any</p> <p>17 standards --</p> <p>18 A. In my --</p> <p>19 Q. -- over the course of his experiment in</p> <p>20 order to calibrate the equipment and ensure the</p> <p>21 accuracy of the test method?</p> <p>22 A. Actually, I asked him that question, and</p> <p>23 the answer is yes.</p> <p>24 Q. And is that reflected in his report?</p> <p>25 A. I think the reason why I asked him that</p>

October 24, 2022

<p style="text-align: right;">233</p> <p>1 question was I may have been uncertain as far as</p> <p>2 what was reported in the document itself. So I</p> <p>3 needed to confirm that based upon my own</p> <p>4 experience working in a laboratory when I was a</p> <p>5 graduate student standardizing the equipment that</p> <p>6 I used on a routine basis. So I simply asked him.</p> <p>7 Q. And that's a pretty typical thing that</p> <p>8 you would expect that the equipment would be</p> <p>9 standardized using --</p> <p>10 A. Yes.</p> <p>11 Q. -- a tool with a known value; right?</p> <p>12 A. Yes, absolutely. And that's how I was</p> <p>13 taught. So, you know, you standardize your</p> <p>14 equipment before you use it. And particularly in</p> <p>15 a case like this, you really want to have it</p> <p>16 standardized because you're writing a report</p> <p>17 regarding a legal matter.</p> <p>18 Q. And that information was not contained</p> <p>19 within Mr. Burns' report; correct?</p> <p>20 A. I don't remember. I don't think so.</p> <p>21 Q. And that's why you asked him about it at</p> <p>22 your meeting within the last couple of weeks?</p> <p>23 A. Yes. It was just to confirm how they go</p> <p>24 about standardizing their equipment. And I</p> <p>25 explained my own experience working in the</p>	<p style="text-align: right;">235</p> <p>1 demonstrate for me to understand how he carried</p> <p>2 out his test.</p> <p>3 Q. Right. And --</p> <p>4 A. And I did the same -- I'm sorry. I did</p> <p>5 the same with Mr. Burns when I visited his</p> <p>6 facility. I requested just to witness it so that</p> <p>7 I can again feel more comfortable in having this</p> <p>8 conversation.</p> <p>9 Q. Okay. So, again, that was all after you</p> <p>10 prepared your reports and formed your --</p> <p>11 A. Yes.</p> <p>12 Q. -- opinions; right?</p> <p>13 A. Yes, that's correct.</p> <p>14 Q. So going back to what you said about</p> <p>15 Dr. Ermakov's report and testing, you mentioned</p> <p>16 looking at his test results where he compares it</p> <p>17 to a blank substrate; right?</p> <p>18 A. That's correct.</p> <p>19 Q. So is that what you're referring to with</p> <p>20 respect --</p> <p>21 A. Yes.</p> <p>22 Q. -- to whether Dr. Ermakov -- I mean,</p> <p>23 that's a control; right?</p> <p>24 A. That's a control, yes.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">234</p> <p>1 laboratory how I learned to standardize equipment</p> <p>2 during an instrumentation course as well as during</p> <p>3 the time that I was in grad school.</p> <p>4 Q. So at the time that you formed and</p> <p>5 prepared your opinions on infringement, you had no</p> <p>6 way of knowing whether Mr. Burns actually</p> <p>7 calibrated his equipment with a known standard?</p> <p>8 A. I would assume that he did because he</p> <p>9 works for what I saw as a reliable company. And</p> <p>10 Dr. Ermakov, being at Rutgers University -- from</p> <p>11 my experience at Rutgers University as a grad</p> <p>12 student there, I know that the equipment routinely</p> <p>13 gets standardized. It's kind of standard</p> <p>14 procedure when you're in an institution of that</p> <p>15 nature.</p> <p>16 Q. And did Dr. Ermakov's report indicate</p> <p>17 that he ran any known standards to calibrate the</p> <p>18 equipment or to ensure the accuracy of the test</p> <p>19 method?</p> <p>20 A. I think when you look at the test</p> <p>21 results where he's comparing it to a blank</p> <p>22 substrate and then each of the test features, I</p> <p>23 think there are three or four more, I needed to</p> <p>24 understand how he arrived at the conclusions that</p> <p>25 he reached in his result. So I asked him to</p>	<p style="text-align: right;">236</p> <p>1 A. But you're talking about standardization</p> <p>2 of the equipment --</p> <p>3 Q. Yeah.</p> <p>4 A. -- and the routine standard -- that the</p> <p>5 equipment is functioning accurately. And that's</p> <p>6 not reflected in that report, to my knowledge.</p> <p>7 Q. Okay.</p> <p>8 A. And I don't think he was -- I don't</p> <p>9 think he needed to indicate that in his -- based</p> <p>10 upon the nature of his report. It was basically a</p> <p>11 comparative study. So we assume that everything</p> <p>12 was standardized. But, again, I can't swear to</p> <p>13 that.</p> <p>14 Q. So you're assuming that everything is</p> <p>15 standardized because you're just comparing the</p> <p>16 results between two products?</p> <p>17 A. No, I'm assuming that it's all</p> <p>18 standardized because of the nature in which it was</p> <p>19 conducted. At Rutgers University, that's a</p> <p>20 standard protocol for laboratories. It's not --</p> <p>21 you know, it's in the chemistry department, and</p> <p>22 routinely there's quality control and quality</p> <p>23 assurance and people who will walk around the</p> <p>24 laboratory making sure that everything is working</p> <p>25 correctly.</p>

October 24, 2022

<p style="text-align: right;">237</p> <p>1 I also think in a commercial laboratory</p> <p>2 like ETS that they, too, have guidelines for</p> <p>3 standardization of their equipment before they run</p> <p>4 any samples for any clients.</p> <p>5 Q. Right. So your expectation was that</p> <p>6 they would have run standards to calibrate the</p> <p>7 equipment, but you can't be certain whether or not</p> <p>8 they did?</p> <p>9 A. Yeah, I wasn't there.</p> <p>10 Q. Okay. So while we're talking about</p> <p>11 controls, did Dr. Burns run any controls in his</p> <p>12 experiment?</p> <p>13 A. Yes.</p> <p>14 Q. And what were those? What was the</p> <p>15 control that he ran?</p> <p>16 A. I believe it was simply the pigskin by</p> <p>17 itself in the Faraday cup.</p> <p>18 Q. Okay. And does he -- but he doesn't</p> <p>19 report the results of any testing of the plain</p> <p>20 pigskin prior to application of the formulations;</p> <p>21 correct?</p> <p>22 A. You know, to be honest, I'd have to look</p> <p>23 again at the report to see, but I'm assuming the</p> <p>24 answer is that he did not identify that.</p> <p>25 Q. I mean, I know in Dr. Ermakov's report</p>	<p style="text-align: right;">239</p> <p>1 charge?</p> <p>2 A. That's a question that I would refer you</p> <p>3 to Mr. Burns, as far as exactly what he did, if he</p> <p>4 did anything, to the control.</p> <p>5 Q. Okay.</p> <p>6 A. I'm not -- I'm not comfortable in giving</p> <p>7 you an answer that I may be misleading you.</p> <p>8 Q. Okay. If you were going to measure the</p> <p>9 surface charge of a product applied to a</p> <p>10 substrate, would it be important to make sure that</p> <p>11 that substrate doesn't have a surface charge of</p> <p>12 its own?</p> <p>13 A. The substrate routinely would have a</p> <p>14 surface charge. And the way in which the</p> <p>15 experiments were both conducted was to use the</p> <p>16 substrate with an area of the material being</p> <p>17 tested where each test sample had its own built-in</p> <p>18 control so that if there was a surface charge to</p> <p>19 the paper, in the case of Dr. Ermakov's</p> <p>20 investigation, that would be reflected as the</p> <p>21 natural surface charge of the paper by itself,</p> <p>22 which should be, in fact, equivalent or in very</p> <p>23 close proximity to the surface charge that was</p> <p>24 found in the plain paper control.</p> <p>25 And when the test material is placed in</p>
<p style="text-align: right;">238</p> <p>1 he did test the blank paper and reported results?</p> <p>2 A. Yes. Yes.</p> <p>3 Q. But I did not see that in Mr. Burns.</p> <p>4 Okay.</p> <p>5 A. Yeah, I did not. Yeah.</p> <p>6 Q. Okay. Going back to Dr. Ermakov, the</p> <p>7 control that he used, it was just a plain piece of</p> <p>8 paper; right?</p> <p>9 A. That's correct. I believe it was kind</p> <p>10 of like a cardboard or that which you would find</p> <p>11 like an index card of that nature.</p> <p>12 Q. Okay. And he was able to detect a</p> <p>13 surface charge on that substrate; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. Would you expect to see a surface charge</p> <p>16 on untreated paper?</p> <p>17 A. Yes.</p> <p>18 Q. Is paper conductive?</p> <p>19 A. I think liquids are more conductive, but</p> <p>20 I think that surface charge -- particle charge</p> <p>21 would be on any surface.</p> <p>22 Q. Let's -- actually, going back to</p> <p>23 Mr. Burns, is it your recollection that the</p> <p>24 controls were not just plain pigskin, but pigskin</p> <p>25 that had been ionized to neutralize the existing</p>	<p style="text-align: right;">240</p> <p>1 the apparatus and spun under the electrode, the</p> <p>2 electrode is not on the surface of the test</p> <p>3 material, but it's above, it basically is going to</p> <p>4 give a reading that would reflect the fact that</p> <p>5 half of the test material has no application of</p> <p>6 the test material, is plain paper, and the other</p> <p>7 half has got the actual material on it that's</p> <p>8 being tested.</p> <p>9 So it's kind of like acting -- each of</p> <p>10 the tests are kind of like acting on the basis</p> <p>11 that you've got the control and the active being</p> <p>12 incorporated to negate what may be contributed by</p> <p>13 the substrate.</p> <p>14 Q. Okay. Let me make sure I understand</p> <p>15 that. So you're saying that the way these tests</p> <p>16 were conducted is that it's not just measuring the</p> <p>17 surface charge in the location where the</p> <p>18 formulation is applied, but both in that spot as</p> <p>19 well as outside where it's just the plain</p> <p>20 substrate?</p> <p>21 A. Yes, because the material is spun under</p> <p>22 an electrode. So it's acting as a control within</p> <p>23 the test material itself. So there is a control</p> <p>24 built in, in that if the surface is going to have</p> <p>25 a charge, anything you're adding to that surface</p>

October 24, 2022

<p>241</p> <p>1 will boost that level of charge because of the</p> <p>2 charge that's existent on the material itself that</p> <p>3 you're questioning. So you've got the surface --</p> <p>4 the substrate as the surface, and then you have</p> <p>5 the test sample added to half of that piece of</p> <p>6 paper in the case of Dr. Ermakov.</p> <p>7 Q. Okay. And is this something that you</p> <p>8 learned from your conversations with Mr. Burns and</p> <p>9 Dr. Ermakov?</p> <p>10 A. It was the result of my visit to ask</p> <p>11 them to demonstrate it for me. Because this is</p> <p>12 not something that I have a great deal of</p> <p>13 experience in, and as a result, I could read the</p> <p>14 test results and I can understand his conclusion</p> <p>15 based upon that, but it's very different when you</p> <p>16 actually witness what the investigator did in the</p> <p>17 test procedure. Since I had no involvement in</p> <p>18 requesting the tests or any knowledge whatsoever</p> <p>19 about the nature of the laboratory that it was</p> <p>20 done, it was best for me to witness it, and that's</p> <p>21 what I did.</p> <p>22 Q. That's what you did when you met with</p> <p>23 them earlier this month?</p> <p>24 A. Yes.</p> <p>25 Q. Okay.</p>	<p>243</p> <p>1 Q. Okay. So you're talking there about an</p> <p>2 organ like a heart as opposed to specifically</p> <p>3 human skin; right?</p> <p>4 A. Well, if you have to use -- if you have</p> <p>5 to use an animal model, you really want to have an</p> <p>6 animal model that is as closely resembling the</p> <p>7 human in which the agent is going to be tested. I</p> <p>8 would not be testing, for example, a digestive</p> <p>9 function of a cow who has a four-compartment</p> <p>10 stomach and compare that to a human because we</p> <p>11 only have a one-compartment. So I want to find a</p> <p>12 molding that is as closely physiologically</p> <p>13 similar. And I think Mr. Burns made that</p> <p>14 selection on that basis.</p> <p>15 Q. Okay.</p> <p>16 A. But that's a question that you'd</p> <p>17 probably have to pose to him to better explain it.</p> <p>18 Q. Yeah. But I'm wondering about what you</p> <p>19 did to independently confirm that the methodology</p> <p>20 was sound with respect to the substrate that was</p> <p>21 selected here. So it sounds like you did some</p> <p>22 research on your own in the literature?</p> <p>23 A. I tried to find as much as I could in</p> <p>24 order to -- again, if you're asking for an opinion</p> <p>25 from me, I can't just pull it out of thin air. I</p>
<p>242</p> <p>1 A. Yes.</p> <p>2 Q. Now, both sets of tests, they were</p> <p>3 conducted at room temperature; correct?</p> <p>4 A. I believe so, yes.</p> <p>5 Q. And that's lower than what you would</p> <p>6 expect for human body temperature?</p> <p>7 A. Yes.</p> <p>8 Q. Now, Mr. Burns used pigskin as a</p> <p>9 substrate for his testing; right?</p> <p>10 A. That's correct.</p> <p>11 Q. And at the time that you prepared your</p> <p>12 report, what did you do to determine whether that</p> <p>13 was an appropriate substrate for purposes of this</p> <p>14 test?</p> <p>15 A. I simply looked at the literature on the</p> <p>16 use of either artificial skin or using another</p> <p>17 example. And my understanding simply from my</p> <p>18 experience in physiology and my teaching</p> <p>19 experience, I've been well aware and I've taught</p> <p>20 about the subject. In the case of valve</p> <p>21 replacements in hearts, the valves are usually</p> <p>22 derived from animals such as pig. So it's a</p> <p>23 suitable physiologically significant tissue to use</p> <p>24 to demonstrate what would happen in the case of</p> <p>25 human skin.</p>	<p>244</p> <p>1 have to go back and look at references and see</p> <p>2 what other people may have used in these kind of</p> <p>3 determinations. And, also, one of my concerns is</p> <p>4 always is this a standard test? Is this something</p> <p>5 that routinely if I were going to investigate this</p> <p>6 as part of my research project, is this the</p> <p>7 protocol that I would use? That's just my own</p> <p>8 nature of how I would be investigating things.</p> <p>9 Q. Okay. And I have a few follow-up</p> <p>10 questions there.</p> <p>11 So the literature that you researched,</p> <p>12 that would be the paper that you've cited in your</p> <p>13 reply report; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. Okay.</p> <p>16 A. Yes, I think the researcher -- I'm not</p> <p>17 certain -- it has a three-letter word, Abd or Adb.</p> <p>18 That's the person that I relied on, yes.</p> <p>19 Q. Okay. So that was something that you</p> <p>20 did in connection with forming your opinions in</p> <p>21 your reply report; right?</p> <p>22 A. That's correct. That's correct.</p> <p>23 Q. Now, you also mentioned one of your</p> <p>24 concerns in research projects is whether something</p> <p>25 is a standard test. Have you ever had the need to</p>

October 24, 2022

<p>245</p> <p>1 measure the surface charge of a pharmaceutical 2 formulation over the course of your career? 3 A. No. 4 MR. KREMEN: Objection to form. 5 BY MS. PETERSON: 6 Q. So the testing that Mr. Burns and 7 Dr. Ermakov did, you've never had occasion to 8 consider such testing or rely on any such testing 9 apart from your work for Trutek in these matters; 10 right? 11 MR. KREMEN: Objection to the form of 12 the question. 13 THE WITNESS: Well, I've never had the 14 opportunity to investigate it like that. That was 15 not something that I've ever done. 16 BY MS. PETERSON: 17 Q. Okay. 18 A. So no other client has come to me to 19 investigate surface charge. 20 Q. Okay. 21 A. If that's what you want to know. 22 Q. Okay. And you never did that over the 23 course of your work through the various companies 24 that you've worked with over your career either; 25 right?</p>	<p>247</p> <p>1 using. I don't know what the restrictions are or 2 the legalities relative to the types of skin that 3 might be employed in a laboratory setting like 4 ETS. 5 Q. Okay. Do you know what part of the pig 6 the skin samples came from? 7 A. No, I don't. 8 Q. Do you know what the physiological 9 differences are between pigskin and human skin? 10 A. Well, in my reading, it indicates the 11 fact that they are very similar. 12 Q. Do you know whether there are any 13 differences between pigskin and human skin, 14 particularly within, like, the area of the nostril 15 and nasal passages? 16 A. I couldn't really comment. I would have 17 to do another investigation as far as cellular 18 composition of the skin. 19 Q. Now, Dr. Ermakov used paper as a 20 substrate in his testing; right? 21 A. That's correct. 22 Q. And did you do anything to independently 23 determine whether paper was an appropriate 24 substrate for purposes of this test? 25 A. When I reviewed Dr. Ermakov's work, I</p>
<p>246</p> <p>1 A. No, the only closely resembling activity 2 would have been in my instrumentation and my 3 honor's course in chemistry and measuring ion and 4 absorption to services. That would pretty much be 5 the only connection that I can relate to. 6 Q. Okay. Now, going back to something else 7 you said, you said it was important to use an 8 animal model that closely resembles or is similar 9 to the intended test subject; correct? 10 A. That's correct. 11 Q. Are you aware of the fact that human 12 cadaver skin is also available for testing? 13 A. Yes. And you could also use artificial 14 skin. So there are options that could be used. 15 Q. Would you find human skin to be a more 16 accurate reflection of how a surface charge will 17 exhibit upon application of these products to 18 human skin as compared to pigskin? 19 A. I can't really comment on that 20 accurately. So I would say I'm not really 21 certain. I can make assumptions, but one of the 22 key features is really if, in fact, the skin 23 physiologically is going to be the same. And it's 24 also a question of availability, whether or not 25 that's something that the laboratory would be</p>	<p>248</p> <p>1 assumed that it was to establish some degree of 2 baseline that, in fact, the test materials would 3 have a surface charge. So regardless of what he 4 used, I think he probably had evidence that paper 5 would be a good substrate, an adequate substrate 6 to conduct this kind of investigation to establish 7 a baseline for surface charge. 8 I also, when I met with him, asked him 9 if he had done this work previously, and he has. 10 So if he's doing this, he must know that this 11 works appropriately, particularly to establish a 12 baseline. The work by Burns would be a step above 13 the work by Ermakov in establishing it in a more 14 physiological or physiologically similar condition 15 using the pigskin to what you would see in human 16 flesh. 17 Q. So when you refer to Dr. Ermakov's work 18 as establishing a baseline, you're referring to 19 the fact that it's measuring surface charge but 20 not on a substrate that really is reflective of 21 how the products are going to be used in -- under 22 actual real life conditions? 23 A. I think that the purpose of his study 24 was simply to establish whether or not there was a 25 charge and how you are comparing those examples.</p>

October 24, 2022

<p style="text-align: right;">249</p> <p>1 So he had to use something. It's similar to what 2 you would do in any kind of experiment. You have 3 to start someplace. 4 Q. Okay. And then all of that explanation 5 that you just got about Dr. Ermakov, again, that 6 was from your conversation with him a couple of 7 weeks ago? 8 A. Yes. 9 Q. That was not information that you were 10 aware of at the time you prepared your reports on 11 infringement; correct? 12 A. No, that's correct. 13 Q. So over the course of your career, when 14 you've used equipment to conduct various tests, is 15 it important to run a number of tests to confirm 16 reliability of the method? 17 A. I'm not following your question when you 18 say -- 19 Q. Well, if you wanted to -- let's say you 20 wanted to measure the surface charge of something. 21 Would it be important to you to run the test in 22 multiple replications so that you can ensure -- 23 A. Oh, yes. 24 Q. -- the reliability and precision of the 25 method?</p>	<p style="text-align: right;">251</p> <p>1 results that for the most part the measurements 2 obtained by Dr. Burns and Ermakov were pretty 3 consistent with each other; right? 4 A. Yes. 5 Q. With one exception, do you recall that 6 the results obtained from the measurement by 7 Dr. Burns of the Blue Willow product, that there 8 was actually a pretty wide variation in those 9 results? 10 A. Yes, that's to be expected. 11 Q. And why is that to be expected? 12 A. There could be any number of factors 13 that can contribute to that. But the purpose of 14 the study was just to establish whether or not 15 there was a surface charge. 16 Q. Okay. 17 A. It wasn't a -- in doing experimentation, 18 there are different goals, and it's either a 19 quantifiable goal or just the identification goal. 20 And the goal in both of these studies, to my 21 knowledge, was to identify the fact that the 22 samples that were tested, in fact, exerted a 23 surface charge. 24 Q. So for purposes of your analysis and 25 your opinions, you were relying on the fact that a</p>
<p style="text-align: right;">250</p> <p>1 A. Yes, absolutely. Absolutely. And, you 2 know, typically, whenever -- at the time when I 3 was conducting research work at Rutgers 4 University, you know, we would run multiple 5 samples so that we would get an average value, and 6 that average value was then statistically analyzed 7 so that we would have a framework. 8 But before we would go to the 9 statistical analysis of it, we had to establish 10 some basics that, in fact, what we were doing was 11 appropriate, that we were getting a reading. So 12 we established that baseline. 13 Q. Okay. And so before relying on the 14 results of that testing, you would run the 15 experiment with a number of replicates, you would 16 determine the average, the standard deviation, and 17 then determine whether those results were 18 statistically significant? 19 A. Yes. 20 Q. Okay. 21 MR. KREMEN: Objection. 22 THE WITNESS: But that wasn't relevant 23 to what he did. 24 BY MS. PETERSON: 25 Q. Now, you recall from reviewing the</p>	<p style="text-align: right;">252</p> <p>1 surface charge was measured; correct? 2 A. That's correct. That's my 3 understanding, yes. 4 Q. Okay. You weren't concerned necessarily 5 with what those particular measurements were. 6 A. No. And I wasn't concerned about 7 statistical significance relative to these kinds 8 of trials. If we were to look at things where we 9 were measuring a value that's found in a sample 10 where the reliability of the test protocol that's 11 used is going to give me a closer measure or 12 measurements, as you see in some of the samples, 13 you know, that would be something that I would be 14 interested in. But I don't think that that was 15 the purpose of either one of these trials. 16 Q. Now, if you saw a wide variability in 17 results of the same testing procedure on the same 18 sample, would that suggest to you that there might 19 be some flaw in the method? 20 A. I would first repeat the test just to 21 confirm what I'm witnessing for why there is 22 variability. If it's a factor that I can control 23 or correct, I would execute that factor to correct 24 the problem. So with both of these -- even though 25 there is variability in that test that was done by</p>

October 24, 2022

<p>253</p> <p>1 Burns, the point is that this still was surface 2 charge and -- 3 Q. No, I understand. You were still just 4 looking -- 5 A. Yes. 6 Q. -- for a surface charge measurement, but 7 I -- 8 A. That's all it was. 9 Q. I'm asking a more basic question. If 10 you see wide variability, that could suggest a 11 flaw in the method; right? 12 A. It could. It could. 13 Q. It could also suggest that the 14 particular method is not very accurate? 15 A. It could question the accuracy. It can 16 question even the conditions in which the study 17 was conducted. 18 Q. And it could also question the 19 reliability of the method; right? 20 A. Well, considering the nature of what was 21 found in the one study -- or the one sample versus 22 the others, there seemed to be more consistency in 23 the other study -- or the other samples as 24 compared to the one of the NanoBio product. 25 The problem there is, at least I</p>	<p>255</p> <p>1 A. Because that was part of the '802 2 patent's claim, is that it has this electrostatic 3 charge and it is cationic. 4 Q. But if all you were interested in 5 knowing was that the products exhibited an 6 electrostatic charge, why did it matter to you 7 that they were of the same order of magnitude? 8 A. Just to see how closely resembling they 9 are. The cation that is used, if it's 10 benzalkonium chloride, and the quantification 11 therein, should be similar if the amounts are the 12 same. 13 Q. And why was it important to you to know 14 whether the surface electrostatic charge was 15 similar between NanoBio Protect and NasalGuard? 16 A. Well, because the claims are being made 17 about the product. And that's the basis of this 18 whole proceeding, is that the two items have 19 similarity. NanoBio and Trutek's NasalGuard 20 products, they are similar. 21 Q. Okay. So when you just referred to the 22 claims being made about the product, you're not 23 talking about the patent claims here. You're 24 talking about the statements made about the 25 products on, like, the websites and non-product</p>
<p>254</p> <p>1 investigated this a little bit further, in looking 2 at things like the water content, the products 3 reflect the fact that they utilized water. And in 4 my investigation, of course this is after the 5 fact, but looking at things like purified water 6 versus distilled deionized water, deionized water 7 would be removing those cations, whereas purified 8 water may, in fact, contribute some cations. So 9 that might be a factor. But, again, I can't 10 confirm that because I didn't do any additional 11 testing. 12 Q. Okay. Now, the conclusion that you 13 relied on from the Burns and Ermakov testing was 14 that both the Trutek products and the NanoBio 15 Protect product exhibited a surface charge, and 16 that surface charge was of the same order of 17 magnitude; correct? 18 A. That's correct. 19 Q. And why was it important to you that the 20 surface charge was of the same order of magnitude 21 between the two products? 22 A. Just to determine the amount. That was 23 pretty much it. Is it there or not? Does it 24 contribute any cationic charge? 25 Q. Okay.</p>	<p>256</p> <p>1 labeling; right? 2 A. Right. Right. 3 Q. I just wanted to get some terminology 4 clear because we have "claims" used in two 5 contexts. 6 A. Yeah. 7 Q. So how did you use the conclusion that 8 NanoBio Protect and Trutek's NasalGuard products 9 exhibited an electrostatic charge of the same 10 order of magnitude in reaching your opinion on 11 infringement? 12 MR. KREMEN: Objection to form. 13 THE WITNESS: I simply relied on the 14 documentation that was supplied -- 15 BY MS. PETERSON: 16 Q. Okay. 17 A. -- by both of the researchers. 18 Q. But how did you use that in reaching 19 your opinion? How was it relevant to your opinion 20 on infringement? 21 A. Because you have to see whether or not, 22 in fact, if the existence of the patent -- the 23 '802 patent preceded the marketing of the product 24 to NanoBio, then that NanoBio product is 25 infringing on the patented protected product of</p>

October 24, 2022

<p>257</p> <p>1 Trutek. I'm looking at it from that standpoint.</p> <p>2 Q. Okay. Let me try asking the question</p> <p>3 again. So you relied on the conclusion from Burns</p> <p>4 and Ermakov that Trutek's products and</p> <p>5 BlueWillow's product exhibited an electrostatic</p> <p>6 charge of the same order of magnitude; correct?</p> <p>7 A. That's correct.</p> <p>8 Q. And how did you use that information to</p> <p>9 determine whether NanoBio Protect satisfies the</p> <p>10 elements of the '802 patent claims?</p> <p>11 A. Because of where it's stated in the '802</p> <p>12 patent. The '802 patent talks about the</p> <p>13 electrostatic charge. That's a significant factor</p> <p>14 for the methodology of how that product works.</p> <p>15 Q. The '802 patent claims, they don't</p> <p>16 require an electrostatic charge; correct?</p> <p>17 MR. KREMEN: Objection.</p> <p>18 BY MS. PETERSON:</p> <p>19 Q. That language is not in the claims;</p> <p>20 right?</p> <p>21 A. I have to go back and take a look</p> <p>22 exactly. I'm sorry, it's late in the day.</p> <p>23 Q. Yeah, sure. No problem. We can pull</p> <p>24 that back up. Do you have that copy of the patent</p> <p>25 handy still?</p>	<p>259</p> <p>1 particular electrostatic charge.</p> <p>2 A. Quantified?</p> <p>3 Q. Correct.</p> <p>4 A. No, it doesn't.</p> <p>5 Q. Okay.</p> <p>6 A. There's no quantification that's listed</p> <p>7 here, no.</p> <p>8 Q. And you would also agree that the</p> <p>9 results of the Burns and Ermakov testing actually</p> <p>10 show that the electrostatic charge exhibited by</p> <p>11 the Trutek and BlueWillow products was actually</p> <p>12 different; right?</p> <p>13 A. Quantifiably, yes.</p> <p>14 Q. Right.</p> <p>15 A. But, again, I go back to my statement</p> <p>16 that it wasn't a quantification. It was more of</p> <p>17 an identification that both products exhibited the</p> <p>18 electrostatic charge when applied to the</p> <p>19 substrate.</p> <p>20 Q. Okay.</p> <p>21 A. That's how I understood it.</p> <p>22 Q. Okay. So if your analysis was focused</p> <p>23 on determining whether NanoBio Protect --</p> <p>24 A. Yes.</p> <p>25 Q. -- infringes the '802 patent claims, why</p>
<p>258</p> <p>1 THE REMOTE TECHNICIAN: I'm sorry,</p> <p>2 Ms. Peterson, are you speaking to me if I have</p> <p>3 that copy handy?</p> <p>4 MS. PETERSON: No, I was asking</p> <p>5 Dr. Lemmo.</p> <p>6 THE WITNESS: Oh, I don't have it -- no,</p> <p>7 I don't have it physically near me. That's why</p> <p>8 I'm just -- I'm rummaging around.</p> <p>9 MS. PETERSON: Okay. Then, yeah, can we</p> <p>10 pull up on the screen Exhibit 2 and go to --</p> <p>11 THE WITNESS: Oh, I found it. All</p> <p>12 right.</p> <p>13 THE REMOTE TECHNICIAN: Of course I can</p> <p>14 pull it up.</p> <p>15 MR. KREMEN: He has it.</p> <p>16 THE WITNESS: I have it.</p> <p>17 BY MS. PETERSON:</p> <p>18 Q. Okay. Let's look at Claim 1.</p> <p>19 A. Yeah.</p> <p>20 Q. It talks about electrostatically</p> <p>21 inhibiting; right?</p> <p>22 A. Right. Right.</p> <p>23 Q. And electrostatically attracting; right?</p> <p>24 A. Right.</p> <p>25 Q. But the claims don't require a</p>	<p>260</p> <p>1 was it relevant to you that NanoBio Protect had a</p> <p>2 surface electrostatic charge of the same order of</p> <p>3 magnitude as NasalGuard?</p> <p>4 A. Well, it would probably -- again, it</p> <p>5 would probably reflect the composition of the</p> <p>6 NanoBio Protect relative to the amount of cation</p> <p>7 that's being contributed by the ingredients of the</p> <p>8 NanoBio Protect. So, in other words, if I look at</p> <p>9 the benzalkonium chloride content of both</p> <p>10 products, they're both going to contribute cation.</p> <p>11 And that's going to be a significant factor as far</p> <p>12 as how that product will work.</p> <p>13 Q. Okay. So, in other words, you're</p> <p>14 assuming that because the two products had the</p> <p>15 same order of magnitude of electrostatic surface</p> <p>16 charge, they had the same ingredients?</p> <p>17 MR. KREMEN: Objection.</p> <p>18 THE WITNESS: I can't make that</p> <p>19 assumption because there are multiple ingredients</p> <p>20 in both products.</p> <p>21 BY MS. PETERSON:</p> <p>22 Q. But because they have the same order of</p> <p>23 magnitude, you're assuming that the products</p> <p>24 operate in the same manner?</p> <p>25 A. They have similarity.</p>

October 24, 2022

<p>261</p> <p>1 Q. Okay. And so you considered -- so, in</p> <p>2 other words, you considered the surface</p> <p>3 electrostatic charge of NasalGuard and how it</p> <p>4 operates as part of your analysis of whether</p> <p>5 NanoBio Protect practices the elements of the '802</p> <p>6 patent claims?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Let's take a look at your reply</p> <p>9 report now.</p> <p>10 MR. KREMEN: Which one?</p> <p>11 MS. PETERSON: It was marked as</p> <p>12 Exhibit 15.</p> <p>13 MR. KREMEN: Okay. Exhibit 15.</p> <p>14 THE REMOTE TECHNICIAN: Would you like</p> <p>15 me to screen share that?</p> <p>16 MS. PETERSON: Yes, please.</p> <p>17 THE WITNESS: Yes, please.</p> <p>18 MR. KREMEN: His reply report, 15?</p> <p>19 Yeah, okay. Yeah, noninfringement. Okay.</p> <p>20 MS. PETERSON: And if we could go to</p> <p>21 page 7, which is page 8 of the PDF.</p> <p>22 BY MS. PETERSON:</p> <p>23 Q. You see here we have a section titled</p> <p>24 "Charge Destiny Measurement Theory"?</p> <p>25 A. Yes.</p>	<p>263</p> <p>1 the question of conductivity versus surface charge</p> <p>2 and whether they measured conductivity or they</p> <p>3 measured surface charge.</p> <p>4 Q. Okay.</p> <p>5 A. And so I needed clarification to</p> <p>6 understand what they tested and why Dr. Amiji</p> <p>7 thought that it was the measurement of</p> <p>8 conductivity as opposed to surface charge.</p> <p>9 Q. So to just break that down a little bit,</p> <p>10 the Bernardi paper that you cite on page 8, that's</p> <p>11 related to assessing the stability of</p> <p>12 nanoemulsions; right?</p> <p>13 A. Yes. Yes.</p> <p>14 Q. And one of the ways that the stability</p> <p>15 was measured or assessed was by measuring the</p> <p>16 conductivity of the nanoemulsion; right?</p> <p>17 A. Right. And, again, it depends on how</p> <p>18 the electrode -- if the electrode is actually</p> <p>19 touching the surface of the material or it's</p> <p>20 somewhere in proximity to the material. And</p> <p>21 that's the way I understand the difference between</p> <p>22 the two.</p> <p>23 Q. Okay. But this was for the purpose of</p> <p>24 assessing the stability of the product, right, not</p> <p>25 determining whether there was a charge destiny?</p>
<p>262</p> <p>1 Q. Okay. The explanation that you provided</p> <p>2 in this section, is that based on your own</p> <p>3 personal knowledge, or did you obtain this</p> <p>4 explanation from materials that you reviewed?</p> <p>5 A. A combination of things. The materials</p> <p>6 that I reviewed, the ETS model equipment, the</p> <p>7 indicator that it was employed. So I relied</p> <p>8 primarily on that.</p> <p>9 Q. You mean you relied primarily on the --</p> <p>10 A. Written materials.</p> <p>11 Q. -- explanation of the equipment used in</p> <p>12 Mr. Burns' report?</p> <p>13 A. I relied on Mr. Burns' report and what I</p> <p>14 could find also to complement that in the</p> <p>15 literature.</p> <p>16 Q. Okay. Now, whatever you found in the</p> <p>17 literature, you don't have it cited here; right?</p> <p>18 A. Sometimes I do. Sometimes I don't. And</p> <p>19 I think in this particular case I did not cite</p> <p>20 anything except for the question as far as</p> <p>21 Bernardi, there was a paper that spoke about</p> <p>22 nanoemulsions. And a copy of that paper is</p> <p>23 attached. That's on the following page.</p> <p>24 But I think much of what I wrote in</p> <p>25 reply to Dr. Amiji, because Dr. Amiji brought up</p>	<p>264</p> <p>1 A. Yes.</p> <p>2 Q. Okay. Yeah, I think your charge destiny</p> <p>3 discussion on page 7 might be separate from why</p> <p>4 you cited Bernardi; is that correct?</p> <p>5 A. Yeah, it's possible that, you know, at</p> <p>6 the time I was trying to link a few factors</p> <p>7 together.</p> <p>8 Q. Okay. So just to go back to the section</p> <p>9 where you explain charge destiny measurement</p> <p>10 theory, just to confirm, you did look at</p> <p>11 literature, but that's not cited here in your</p> <p>12 report; right?</p> <p>13 A. Yes, that's correct. This is that which</p> <p>14 I found out in the literature.</p> <p>15 Q. But the literature that you relied on is</p> <p>16 not identified; right?</p> <p>17 A. Yes, that's correct. It's not</p> <p>18 identified in my report.</p> <p>19 Q. Okay. Now, that Bernardi paper, the</p> <p>20 particular oil-in-water nanoemulsion assessed in</p> <p>21 that paper, that was a rice brand oil</p> <p>22 nanoemulsion?</p> <p>23 A. Yes.</p> <p>24 Q. And, again, there was no discussion in</p> <p>25 that paper of measuring electrostatic charge of</p>

October 24, 2022

<p>265</p> <p>1 the nanoemulsion; right?</p> <p>2 A. No, it was mostly reflective of</p> <p>3 Dr. Amiji's reference to conductivity. And, you</p> <p>4 know, I included the Bernardi paper really in the</p> <p>5 statement that precedes where I indicate in 2011</p> <p>6 that conductivity of the nanoemulsion is usually</p> <p>7 measured to determine the stability. The testing</p> <p>8 was not intended -- or at least what I was trying</p> <p>9 to express was that the testing that was done in</p> <p>10 the two laboratory settings was not to determine</p> <p>11 stability. It was to determine the presence of</p> <p>12 the charge.</p> <p>13 Q. Okay. So Bernardi measured conductivity</p> <p>14 to assess stability of the nanoemulsion?</p> <p>15 A. Yes. Yes.</p> <p>16 Q. And you cited the Bernardi paper to</p> <p>17 support your understanding that Burns and Ermakov</p> <p>18 were testing surface charge, not conductivity?</p> <p>19 A. That's correct.</p> <p>20 Q. Okay. And you're aware that -- never</p> <p>21 mind. We can move on to [sic] that.</p> <p>22 Now, another paper that you mentioned</p> <p>23 earlier -- and it's cited on the next page of your</p> <p>24 report if we move forward a page.</p> <p>25 So on page 8, in the second full</p>	<p>267</p> <p>1 about what skin -- alternative skin models might</p> <p>2 be appropriate for measuring electrostatic charge</p> <p>3 of a product applied to human skin; right?</p> <p>4 A. No, that's correct.</p> <p>5 Q. Okay. Let's move forward to page 10 of</p> <p>6 your reply report.</p> <p>7 A. Sure.</p> <p>8 Q. Okay. And here we have a situation that</p> <p>9 we have titled as "Admissions Made Directly By</p> <p>10 BlueWillow"; correct?</p> <p>11 A. Yes, that's correct.</p> <p>12 Q. Okay. And this would be the various</p> <p>13 statements that you identified on BlueWillow's</p> <p>14 website; correct?</p> <p>15 A. Yes, you're correct.</p> <p>16 Q. Okay. You didn't review any other</p> <p>17 documents showing any testing or providing any</p> <p>18 other information to substantiate that the product</p> <p>19 operates in a manner described by BlueWillow on</p> <p>20 its website; right?</p> <p>21 A. No, I did not see that.</p> <p>22 Q. Okay. We can go to the next page. This</p> <p>23 is page 11 of your reply report. There are four</p> <p>24 bullet points listed. And these are statements</p> <p>25 that you relied on from Nano -- from the NanoBio</p>
<p>266</p> <p>1 paragraph, this is your discussion of that -- or</p> <p>2 sorry, third full paragraph --</p> <p>3 MS. PETERSON: If you scroll down some</p> <p>4 more.</p> <p>5 BY MS. PETERSON:</p> <p>6 Q. This is the paper that you mentioned</p> <p>7 regarding alternative skin models by --</p> <p>8 A. Yes.</p> <p>9 Q. -- Abd?</p> <p>10 A. Abd, yes. I don't --</p> <p>11 Q. Abd?</p> <p>12 A. I don't know how they pronounce it, but</p> <p>13 I -- Abd, I would say.</p> <p>14 Q. Okay. Now, you understand that this</p> <p>15 paper is directed to assessing whether it's</p> <p>16 appropriate to use alternative skin models for</p> <p>17 assessing drug permeation through the skin; right?</p> <p>18 A. Yes. Yes.</p> <p>19 Q. So, in other words, that's the ability</p> <p>20 of a drug or a formulation to pass through the</p> <p>21 various layers of the skin into the bloodstream?</p> <p>22 A. Right. Right. My goal was to simply</p> <p>23 state that you can use animal models other than</p> <p>24 using human skin.</p> <p>25 Q. Okay. This paper doesn't say anything</p>	<p>268</p> <p>1 Protect website; correct?</p> <p>2 A. Yes, from BlueWillow's website on the</p> <p>3 product NanoBio.</p> <p>4 Q. Okay. So -- hang on a second.</p> <p>5 That's interesting. You have four</p> <p>6 statements listed on page 10 of your -- never</p> <p>7 mind.</p> <p>8 You've got four bullet points listed on</p> <p>9 your opening report, but they don't match up with</p> <p>10 the same four bullet points listed in your reply</p> <p>11 report, but I think we can use this.</p> <p>12 A. Yeah, and it's possible what I was</p> <p>13 addressing at the time -- at different times that</p> <p>14 they were submitted.</p> <p>15 Q. Okay. So looking at the third bullet</p> <p>16 point here, it says, "Dry skin allows germs to</p> <p>17 penetrate. Nanodroplets hydrate the skin,</p> <p>18 preventing dryness and cracking"; right?</p> <p>19 A. Yes.</p> <p>20 Q. And presumably that reference to the</p> <p>21 nanodroplets, that would be the nanodroplets of</p> <p>22 the NanoBio Protect product?</p> <p>23 A. Yes, because I believe it comes directly</p> <p>24 from their website.</p> <p>25 Q. Okay. So here BlueWillow is explaining</p>

October 24, 2022

<p>269</p> <p>1 that the nanodroplets hydrate the skin, prevents</p> <p>2 dryness and cracking, which could otherwise allow</p> <p>3 germs to penetrate the skin; correct?</p> <p>4 A. That's correct.</p> <p>5 Q. Okay.</p> <p>6 MS. PETERSON: And then if we scroll --</p> <p>7 can we scroll down a little bit to see the rest of</p> <p>8 the page.</p> <p>9 BY MS. PETERSON:</p> <p>10 Q. Okay. So then there's a sentence that</p> <p>11 starts, "The NanoBio Protect product adheres to</p> <p>12 the nasal tissue in a thin film. If this were not</p> <p>13 so, the liquid would immediately drip out";</p> <p>14 correct?</p> <p>15 A. Yes. Yes.</p> <p>16 Q. Did you test a NanoBio Protect product</p> <p>17 to see if it forms a thin film upon application to</p> <p>18 the skin?</p> <p>19 A. No.</p> <p>20 Q. Did you test a NanoBio Protect product</p> <p>21 to see if any of the liquid drips out upon</p> <p>22 application?</p> <p>23 A. No.</p> <p>24 Q. Okay. You then go on to say that, "The</p> <p>25 nanoemulsion becomes impermeable, not allowing</p>	<p>271</p> <p>1 component parts that will add to protecting and</p> <p>2 hydrating the skin.</p> <p>3 Q. Okay.</p> <p>4 A. So it's not going to irritate. So there</p> <p>5 are similarities, definite similarities,</p> <p>6 intentional or otherwise, but I'm recognizing the</p> <p>7 similarities.</p> <p>8 Q. Okay. But these statements don't</p> <p>9 reference a thin film being used to trap or hold</p> <p>10 particles; correct?</p> <p>11 A. No, that's correct.</p> <p>12 Q. Okay. And you would also agree that</p> <p>13 hydrating the skin to prevent germs from entering,</p> <p>14 that that's not the same as creating a physical</p> <p>15 barrier that blocks those germs from entering?</p> <p>16 MR. KREMEN: Objection to the form of</p> <p>17 the question.</p> <p>18 THE WITNESS: Can you repeat that or</p> <p>19 restate it?</p> <p>20 BY MS. PETERSON:</p> <p>21 Q. Would you also agree that hydrating the</p> <p>22 skin to prevent germs from penetrating the skin,</p> <p>23 that that's a different mechanism of action from</p> <p>24 creating a physical barrier on the skin to prevent</p> <p>25 the germs from going any farther?</p>
<p>270</p> <p>1 'germs to penetrate'; right?</p> <p>2 A. Correct.</p> <p>3 Q. Okay. So that impermeable -- that's</p> <p>4 what we're talking about when you referenced</p> <p>5 earlier about having adequate impermeability to</p> <p>6 create a physical barrier that prevents the germs</p> <p>7 from penetrating; correct?</p> <p>8 A. That's correct.</p> <p>9 Q. Okay.</p> <p>10 MS. PETERSON: Now, if you can just go</p> <p>11 up a little bit more so we can see those bullet</p> <p>12 points again.</p> <p>13 BY MS. PETERSON:</p> <p>14 Q. Here, wouldn't you agree that BlueWillow</p> <p>15 is saying that its product is operating to prevent</p> <p>16 germs from penetrating the skin, not by creating</p> <p>17 an impermeable thin film or a physical barrier,</p> <p>18 but rather by hydrating the skin; right?</p> <p>19 A. Again, what we're talking about is a</p> <p>20 product that's intended not as a skin protective,</p> <p>21 but as a product that is going to help trap</p> <p>22 contaminants from entering the nasal passage.</p> <p>23 While, yes, this is going to have a benefit in</p> <p>24 hydrating the skin, but if you go back to the '802</p> <p>25 patent with the formulations, there is also</p>	<p>272</p> <p>1 MR. KREMEN: Same objection.</p> <p>2 THE WITNESS: Well, from going farther</p> <p>3 and setting up -- setting up a barrier so that</p> <p>4 they don't leave the treated surface to enter the</p> <p>5 nasal passage.</p> <p>6 BY MS. PETERSON:</p> <p>7 Q. Okay.</p> <p>8 A. My concern was not focused on protecting</p> <p>9 dry skin as a vehicle or an entry point for</p> <p>10 microorganisms to invade. The goal, or at least</p> <p>11 the way I'm understanding it, is the role of the</p> <p>12 two products in preventing the inhalation of the</p> <p>13 harmful particles. So you see the similarities.</p> <p>14 There are --</p> <p>15 Q. Yeah, I see the similarity in that both</p> <p>16 prevents germs from entering the system.</p> <p>17 A. Right.</p> <p>18 Q. But do you agree with me that they are</p> <p>19 prevented from entering the system through</p> <p>20 different physical means?</p> <p>21 A. Yes, that's correct. One is a</p> <p>22 nanoemulsion, and the other one is not identified</p> <p>23 as an emulsion. It's a gel.</p> <p>24 Q. Okay.</p> <p>25 A. So physically, when you look at the</p>

Transcript of Edward A. Lemmo, Ph.D.

69 (273 to 276)

October 24, 2022

<p style="text-align: right;">273</p> <p>1 products or at least -- I don't have that product.</p> <p>2 I don't have the physical product NanoBio. So I</p> <p>3 don't know what [inaudible].</p> <p>4 Q. Okay. I think we're talking about two</p> <p>5 completely separate things here. The two things</p> <p>6 you were envisioning in your mind were NanoBio</p> <p>7 Protect and then Trutek's NasalGuard?</p> <p>8 A. Right.</p> <p>9 Q. Okay. I'm asking about something</p> <p>10 completely different.</p> <p>11 A. Okay. All right. Let's go back over</p> <p>12 that.</p> <p>13 Q. I'm just asking whether -- I'm asking</p> <p>14 whether hydrating the skin to prevent germs from</p> <p>15 penetrating is a different mechanism of action</p> <p>16 from creating a physical barrier on the skin?</p> <p>17 A. Yes.</p> <p>18 Q. Okay.</p> <p>19 A. Yes.</p> <p>20 MS. PETERSON: Let's go off the record.</p> <p>21 THE VIDEOGRAPHER: We're going off the</p> <p>22 record. The time is now 5:37 p.m.</p> <p>23 (Recess from the record.)</p> <p>24 THE VIDEOGRAPHER: We're back on the</p> <p>25 record. The time is now 5:46 p.m.</p>	<p style="text-align: right;">275</p> <p>1 And then let's mark as Exhibit 20 a copy</p> <p>2 of the Bernardi paper. This is item No. 14.</p> <p>3 (Lemmo Deposition Exhibit 20 was marked</p> <p>4 for identification and attached to the</p> <p>5 transcript.)</p> <p>6 THE REMOTE TECHNICIAN: Stand by.</p> <p>7 BY MS. PETERSON:</p> <p>8 Q. Dr. Lemmo, do you recognize Exhibit 20</p> <p>9 as a copy of the Bernardi paper that you cited and</p> <p>10 attached to your reply expert report?</p> <p>11 A. Yes.</p> <p>12 Q. Great. Okay.</p> <p>13 MS. PETERSON: Next let's mark as</p> <p>14 Exhibit 21 a copy of the Rolf patent application,</p> <p>15 which is item No. 17 in my materials.</p> <p>16 (Lemmo Deposition Exhibit 21 was marked</p> <p>17 for identification and attached to the</p> <p>18 transcript.)</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Dr. Lemmo, do you recognize Exhibit 21</p> <p>21 as a copy of United States Patent Application</p> <p>22 Publication No. U.S. 2004/0071757 issued to Rolf?</p> <p>23 A. Yes.</p> <p>24 Q. And this is the Rolf application that</p> <p>25 you addressed in your responsive report; correct?</p>
<p style="text-align: right;">274</p> <p>1 BY MS. PETERSON:</p> <p>2 Q. Okay. Dr. Lemmo, I appreciate all of</p> <p>3 your time today. I know it's been a long day.</p> <p>4 I'm almost done. I just have a few other little</p> <p>5 housekeeping things to finish up on.</p> <p>6 A. Fine. That's fine.</p> <p>7 MS. PETERSON: Can we please mark as --</p> <p>8 sorry, I just had a helicopter flying overhead.</p> <p>9 MR. KREMEN: We're not going to mark</p> <p>10 that.</p> <p>11 MS. PETERSON: Can we please mark as</p> <p>12 Exhibit 19 a copy of the Abd paper.</p> <p>13 (Lemmo Deposition Exhibit 19 was marked</p> <p>14 for identification and attached to the</p> <p>15 transcript.)</p> <p>16 MS. PETERSON: This is item No. 13 in my</p> <p>17 materials, Jennifer.</p> <p>18 THE REMOTE TECHNICIAN: Yes, stand by.</p> <p>19 BY MS. PETERSON:</p> <p>20 Q. Okay. Dr. Lemmo, do you recognize</p> <p>21 Exhibit 19 as the paper by Eman Abd that you cited</p> <p>22 and attached to your reply expert report?</p> <p>23 A. Yes, I do.</p> <p>24 Q. Okay.</p> <p>25 MS. PETERSON: We can take that down.</p>	<p style="text-align: right;">276</p> <p>1 A. That's correct.</p> <p>2 Q. Okay.</p> <p>3 MS. PETERSON: We can take that down.</p> <p>4 One final document. Let's mark as</p> <p>5 Exhibit 22 a copy of -- it's titled "Declaration</p> <p>6 Lemmo." This is the last document that I</p> <p>7 uploaded.</p> <p>8 (Lemmo Deposition Exhibit 22 was marked</p> <p>9 for identification and attached to the</p> <p>10 transcript.)</p> <p>11 MR. KREMEN: What is it specifically?</p> <p>12 Oh, okay. That's for the Matrixx case.</p> <p>13 BY MS. PETERSON:</p> <p>14 Q. Yeah. So, Dr. Lemmo, do you recognize</p> <p>15 Exhibit 22 as a copy of a declaration that you</p> <p>16 prepared in connection with the Matrixx litigation</p> <p>17 pending in New Jersey?</p> <p>18 A. Yes.</p> <p>19 MR. KREMEN: Can you go down to the</p> <p>20 signature page just to make sure that --</p> <p>21 MS. PETERSON: Yeah, I was going to get</p> <p>22 to that, Stan.</p> <p>23 MR. KREMEN: I want to make sure that he</p> <p>24 identifies it because it's been a long time.</p> <p>25 MS. PETERSON: Sure.</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

Transcript of Edward A. Lemmo, Ph.D.

70 (277 to 280)

October 24, 2022

<p>277</p> <p>1 So can we go to the final page, 2 please -- actually, not the final page. Go to 3 page 7 of the PDF. 4 BY MS. PETERSON: 5 Q. Dr. Lemmo, that's your signature on -- 6 A. That's -- 7 Q. -- page 7; correct? 8 A. Yes, that's my signature. 9 Q. This declaration was executed on 10 January 23rd, 2020; correct? 11 A. That's correct. 12 Q. Okay. 13 MS. PETERSON: Can we go back up to the 14 top of this document. 15 BY MS. PETERSON: 16 Q. Do you see up at the top here that 17 Amirali Haidri is identified on this document? 18 A. Yes. 19 Q. Did you have any discussions or 20 conversations or meetings with Mr. Haidri in 21 connection with the preparation of this 22 declaration? 23 A. No. 24 Q. Okay. 25 MR. KREMEN: May I clarify something</p>	<p>279</p> <p>1 BY MS. PETERSON: 2 Q. Okay. So one of the documents that you 3 reviewed as part of your investigation was the 4 "Determination of Surface Electrostatic Charge On 5 Nasal Application Test Products - Test Conducted 6 and Report Prepared by Dr. Alexei Ermakov." 7 Do you see that? 8 A. Yes. 9 Q. Okay. So based on this, is it your 10 understanding that you also received a copy of and 11 reviewed the results of Dr. Ermakov's testing of 12 the electrostatic charge of the NasalGuard and 13 Matrixx products? 14 A. Yes. 15 Q. Okay. And then looking at the next item 16 in the list, it's identified as "Surface 17 Electrostatic Charge Evaluation of Nasal 18 Application Products - Technical Report," prepared 19 by Shane Burns of Electro-Tech Systems; right? 20 A. Correct. 21 Q. So based on this, is it also your 22 recollection and understanding that you received a 23 copy of and reviewed the results of Mr. Burns' 24 testing of the electrostatic charge of the 25 NasalGuard and Matrixx products?</p>
<p>278</p> <p>1 just for clarification? Amirali Haidri was a 2 local counsel in this case. I was lead counsel -- 3 MS. PETERSON: Okay. Thank you. 4 MR. KREMEN: -- out of state. 5 MS. PETERSON: Okay. Thank you, 6 Mr. Kremen. 7 Can we scroll to page 3 of this 8 declaration. 9 BY MS. PETERSON: 10 Q. Okay. And here in paragraph 8 of your 11 declaration, Dr. Lemmo, you've provided a list of 12 documents that you reviewed as part of your 13 investigation; correct? 14 A. That's correct. 15 Q. And then if you go down and look at the 16 eighth bullet point, you see the -- 17 MR. KREMEN: What line? 18 MS. PETERSON: Bullet point 8. It's the 19 eighth one down on the list. It's identified 20 as -- 21 MR. KREMEN: There's a line number. So 22 if you could point out the -- 23 MS. PETERSON: Line 13. 24 MR. KREMEN: Okay. 25</p>	<p>280</p> <p>1 A. Yes. 2 Q. Okay. 3 MS. PETERSON: Thank you, Dr. Lemmo. I 4 do not have any further questions for you. 5 THE WITNESS: Thank you. 6 MR. KREMEN: Okay. Let's see, who am I 7 talking to? Jennifer? Can you go up -- 8 MS. PETERSON: Stan, do you have any 9 questions for the witness? 10 MR. KREMEN: No, no. I'm sorry, I 11 thought we were off the record. 12 MS. PETERSON: Yeah. So -- 13 THE VIDEOGRAPHER: No, we haven't closed 14 out the record just yet. 15 MR. KREMEN: I'm sorry. 16 MS. PETERSON: So I'm done. It sounds 17 like Mr. Kremen doesn't have any questions. So I 18 think we can conclude the deposition. 19 THE WITNESS: Okay. So I can sign off? 20 Have a great day. Thank you. 21 THE VIDEOGRAPHER: All right. Just a 22 moment, please. 23 This marks the end of the deposition of 24 Dr. Edward A. Lemmo. We're going off the record. 25 The time is now 5:55 p.m.</p>


PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

Transcript of Edward A. Lemmo, Ph.D.

71 (281 to 284)

October 24, 2022

<p>1 (Off the record at 5:55 p.m.)</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>281</p> <p>1 STATE OF MARYLAND)</p> <p>2 ss:</p> <p>3 COUNTY OF MONTGOMERY)</p> <p>4</p> <p>5 I, Matthew Goldstein, Notary Public</p> <p>6 within and for the State of Maryland, do hereby</p> <p>7 certify:</p> <p>8</p> <p>9 That I reported the proceedings in the</p> <p>10 within entitled matter, and that the within</p> <p>11 transcript is a true record of said proceedings.</p> <p>12</p> <p>13 I further certify that I am not related</p> <p>14 to any of the parties to the action by blood or</p> <p>15 marriage, and that I am in no way interested in</p> <p>16 the outcome of this matter.</p> <p>17</p> <p>18 IN WITNESS WHEREOF, I have hereunto set</p> <p>19 my hand this 24th day of October, 2022.</p> <p>20</p> <p>21 </p> <p>22 Matthew Goldstein, RMR, CRR</p> <p>23</p> <p>24</p> <p>25</p>
<p>282</p> <p>1 ACKNOWLEDGEMENT</p> <p>2</p> <p>3 STATE OF MARYLAND)</p> <p>4 ss</p> <p>5 COUNTY OF MONTGOMERY)</p> <p>6</p> <p>7 I, EDWARD LEMMO, PH.D., hereby</p> <p>8 certify, I have read the transcript of my</p> <p>9 testimony taken under oath in my deposition of</p> <p>10 October 24, 2022; that the transcript is a true,</p> <p>11 complete and correct record of what was asked,</p> <p>12 answered and said during this deposition, and that</p> <p>13 the answers on the record as given by me are true</p> <p>14 and correct.</p> <p>15</p> <p>16 _____</p> <p>17 EDWARD LEMMO, PH.D.</p> <p>18</p> <p>19 Sworn and subscribed to before me</p> <p>20 this ____ day of _____, 2022.</p> <p>21</p> <p>22 _____</p> <p>23 Notary Public</p> <p>24</p> <p>25</p>	<p>283</p>

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM